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Brf. of Owen for Choctaw

IN THE

# Supreme Court of the United States.

Filed Mar. 7, 1900.

THE UNITED STATES AND THE WICHITA AND AFFILIATED BANDS OF INDIANS,
APPELLANTS,
*v.* etc
THE CHOCTAW AND CHICKASAW NATIONS,
APPELLEES.
etc

No. 337.
338.
339.

## Brief on Behalf of Choctaw Nation.

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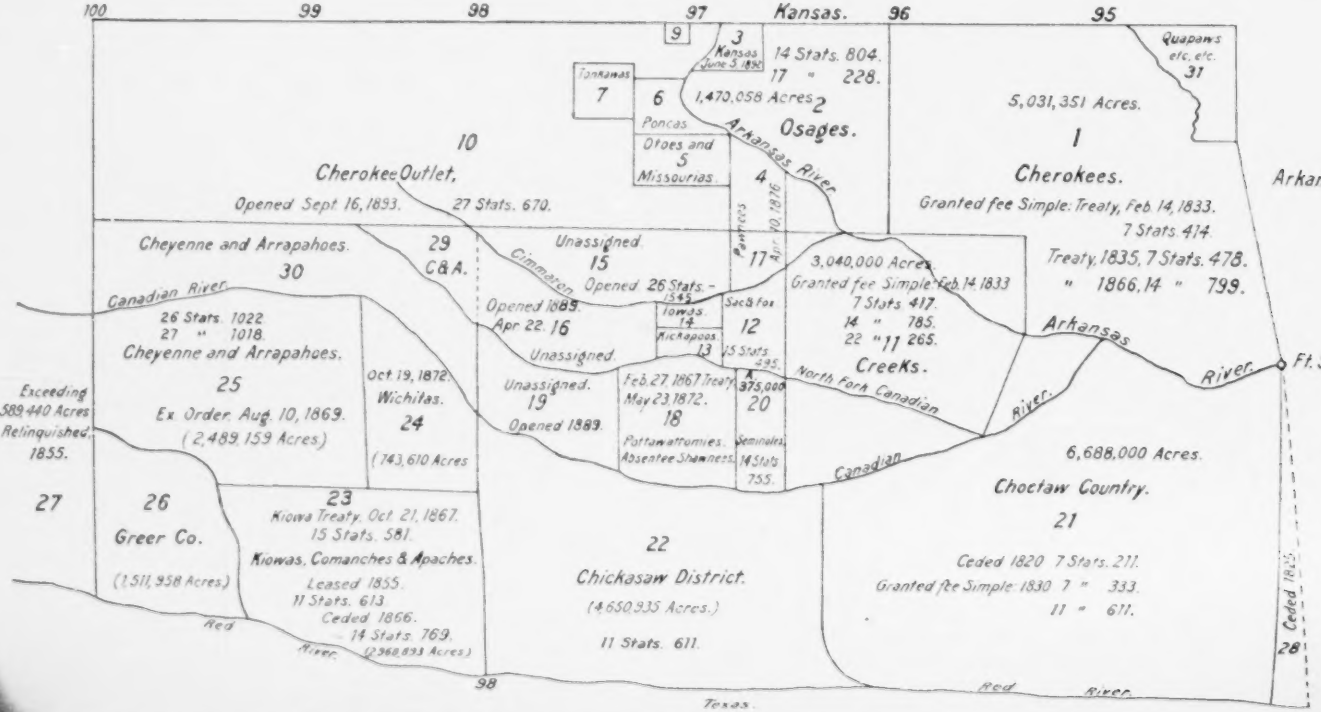
100
99
98
97
Kansas.
96
95
9
3
Kansas
June 5, 1880
14 Stats. 804.
17 " 228.
Tonkawas
7
6
1,470,058 Acres.
2
Osages.
Poncas.
Otoes and
Missourias.
5
4
Arkansas River.
Quapaws
etc, etc.
31
5,031,351 Acres.
1
Cherokees.
Granted fee Simple: Treaty, Feb. 14, 1833.
7 Stats. 414.
Treaty, 1835, 7 Stats. 478.
" 1866, 14 " 799.
Arkansas.
10
Cherokee Outlet,
Opened Sept. 16, 1893.
27 Stats. 670.
Pawnees
Apr. 10, 1876
17
3,040,000 Acres.
Granted fee Simple Feb. 14 1833
7 Stats. 417.
14 " 785.
22 " 11 265.
Creeks.
Cheyenne and Arrapahoes.
30
29
C & A.
Unassigned.
15
Opened 26 Stats. -
1543
Cimmaron
Canadian River.
26 Stats. 1022.
27 " 1018.
Cheyenne and Arrapahoes.
25
Ex. Order. Aug. 10, 1869.
(2,489,159 Acres.)
Opened 1889.
Apr. 22.
16
Iowas
14
Kickapoos
13
Sac & Fox
12
15 Stats.
495.
Arkansas
River.
Ft. Smith.
Unassigned.
Oct. 19, 1872.
Wichitas.
24
(743,610 Acres
Unassigned.
19
Opened 1889.
Feb. 27 1867. Treaty
May 23, 1872.
18
Pottawattomies.
Absentee Shawnees.
A
375,000
20
Seminoles.
14 Stats
755.
North Fork Canadian
River.
Exceeding
6,589,440 Acres
Relinquished
1855.
27
26
Greer Co.
(1,511,958 Acres.)
23
Kiowa Treaty. Oct. 21, 1867.
15 Stats. 581.
Kiowas, Comanches & Apaches.
Leased 1855.
11 Stats. 613.
Ceded 1866.
14 Stats. 769.
(2,968,893 Acres.)
22
Chickasaw District.
(4,650,935 Acres.)
11 Stats. 611.
Canadian
River.
6,688,000 Acres.
Choctaw Country.
21
Ceded 1820 7 Stats. 211.
Granted fee Simple: 1830 7 " 333.
11 " 611.
Ceded 1855
28
Red River.
Red River.
98
Texas.

Tracts 1 to 10. Cherokee Lands. (7 Stats. 414.) Treaty 1833.

Deeded June 14, '83. Settled in full '93.

Tract 2. Set apart Treaty 1866 and sold to Osages. (17 Stats. 228.)
" 3. " " " " Kaws. June 5, 1872.
" 4. " " " " Pawnees, Apr. 10, 1876. (19 Stats., Secs. 4, 29.)
" 5. " " " " Otoes and Missourias, Mar. 3, 1881. (21 Stats. 387.)
" 6. " " " " Poncas, Aug. 15, 1876. (19 Stats. 192, 287; 20 Stats. 76; 21 S. 422.)
" 7. " " " " Nez Perces (20 Stats. 74. 23 Stats. 90.
" " " " " Tonkawas (24 Stats. 624.

Tracts 2 to 10. Bought and paid for full fee by U. S., $8,595,736.12. Mar. 3, 1893. (27 Stats. 640.)

" 11 to 20, 29 and 30. Creek and Seminole lands. Fee simple title. (7 Stats. 417.)

Tract 20. Set apart by Treaty 1866 and sold Seminoles. (14 Stats. 755.)

Settled in full 1889.

" 12. Set apart by Treaty 1866 and sold Sac and Foxes. (15 Stats. 496.)
" 13. Set apart by Treaty 1866 to Kickapoos. (Ex. order Apr. 15, 1883.)
" 14. Set apart by Treaty 1866 to Iowas. (Ex. order Apr. 15, 1883.)

Tracts 15, 16, 19. Set apart by Treaty 1866 and opened as original Oklahoma. Mch. 1, 1889.

Tract 18. Set apart Treaty 1866, and Pottawatomies and Shawnees located May 23, 1872, under Treaty Feb. 27, 1867.
" 17. Set apart by Treaty of 1866 and sold Pawnees @ 30c. an acre. Apr. 10, 1876. (19 Stats. 29, Sec. 4.)

Tracts 29 and 30. Set apart by Treaty of 1866 and assigned Cheyenne and Arapahoes. (Ex. order Aug. 10, 1869.)

" 21 to 28. Ceded Choctaws, 1820. Claim admitted except as to Tract 27.

Tract 27. Choctaw land ceded to Spain by U. S. without Choctaw consent, 1821.

" 28. Receded by Choctaws 1825, now in State of Arkansas.

" 22. Chickasaw District. Set apart by Choctaws, 1837. (4,650,935 acres.)

" 27. Relinquished to U. S. by Choctaws, 1855. (Exceeds 6,589,440 acres.)

Tracts 23 to 26. Leased District, 1855. Choctaws and Chickasaws retaining jurisdiction and full rights of settlement.

" 23 to 26. Ceded to U. S. in trust, to be purchased, for use of friendly Indians by Art. 3, Treaty 1866. (14 Stats. 769.) (7,713,239 acres.)

Tract 25. Assigned Cheyennes and Arapahoes. Ex. order Oct. 10, 1869, and freed from trust limitation by purchase, Mch. 3, 1891. (2,489,159 acres.)

" 24. Assigned Wichitas by Executive permission: now in litigation Court of Claims, Case 18,832. (743,610 acres.)

" 23. Lands "set apart" for Kiowas, Comanches, and Apaches. Oct. 21, 1867. (2,968,893 acres.)

" 26. Greer County. A portion of the Leased District formerly claimed by Texas and not assigned any Indians. (1,511,958 acres.)

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## BRIEF ON BEHALF OF CHOCTAW NATION.

### PREFATORY.

It is the purpose of this argument to show—

1st. That the land in controversy was patented in fee simple to the Choctaws in 1842.

2d. That the United States in 1855 was authorized to provide permanent settlement of the Wichitas and certain other particular Indians thereon "on reasonable terms," and obtained a "lease," paying a certain sum cash thereon on account.

3d. That the "reasonable terms" by which this lease or permit was obtained is open to adjustment on a basis

that shall be "reasonable" as explained to the Choctaws in the treaty of 1855.

4th. That the cession of 1866 was simply an extension of the authority of the United States to locate any Indians without restriction as to the habitat of such proposed immigrant Indians, and that such cession was made in trust to the United States "to be purchased" by or for such Indians "for the use" of such Indians only, the land being at all times held as Indian country and not open to white settlement.

(*a*) This proposition is established by the record attending the negotiations in 1865 at Ft. Smith.

(*b*) By the records of the Government in 1866, during which year the treaty had been consummated.

(*c*) By the subsequent construction of the Executive Department of the United States.

(*d*) By the subsequent construction of the Congress of the United States.

(*e*) By the collateral history of the other tribes of the so-called "Five Civilized Tribes" whose affairs were directed by the United States under the same fixed policy.

(*f*) By the internal evidences of the treaties themselves.

(*g*) By the demonstrated understanding of the Choctaws and Chickasaws.

These reasons are unavoidably interwoven, and, therefore, are set forth preferably in order of time rather than separately under the several headings which comprise the above résumé.

## Argument.

### I.

The Wichita reservation is a portion of the Leased District and was ceded to the Choctaw Nation by the United

States by treaty October 18, 1820. (7 Stats. 211.) The Choctaw Nation paid full value for the land ceded to them by the treaty of 1820 aforesaid.

The treaty of September 27, 1830 (7 Stats. 333), contracted that the United States should cause to be conveyed to the Choctaw Nation "in fee simple to *them* and "*their descendants*" the tract of country previously described and ceded by the treaty of 1820, "if within the "limits of the United States." The Chickasaws acquired an interest in this property by the agreement of January 17, 1837. (11 Stats. 573.)

A patent was issued by the United States of date March 23, 1842, covering the land in question and conveying it to the Choctaw Nation. The patent followed the principle of private property set up in the treaty of 1830, and made the grant, including the Leased District, to the Choctaw Nation, "to have and to hold the same, with all the "rights, privileges, immunities, and appurtenances of "whatever nature thereunto belonging," "*in fee simple* "to them and their descendants."

The treaty of 1855 makes still more clear this idea of personal ownership by describing the lands, *including* the Leased District (Art. 1, 11 Stats., p. 611) and inserting the following language:

"And pursuant to an act of Congress, approved May "28, 1830, the United States do hereby forever *secure* "and *guarantee* the lands embraced within the said limits, "**to the members** of the Choctaw and Chickasaw Tribes, "their heirs and successors, to be held in common; so "that each and *every member of either tribe shall have an* "**equal, undivided interest in the whole.**"

The Choctaws and Chickasaws agreed to accede to the desire of the United States, and the preamble recites: "The "*United States desire* that the Choctaw Indians * * *

" *make provision* for the permanent settlement within the " Choctaw country, of the Wichita and certain other tribes " or bands of Indians, *for which purpose* the Choctaws and " Chickasaws are willing to lease, **on reasonable terms** to " the United States," &c. The right of the United States to the use of any portion of the land in question for Indian settlement was first obtained by the treaty of July 22, 1855, articles 9 and 10 (11 Stats. 611, *et sequitur*).

"ARTICLE 9. The Choctaw Indians do hereby absolutely " and forever quitclaim and relinquish to the United States " all their right, title, and interest in, and to any and all " lands, west of the one hundredth degree of west longi- " tude; and the Choctaws and Chickasaws do hereby lease " to the United States all that portion of their common " territory west of the ninety-eighth degree of west longi- " tude for the *permanent* settlement of the Wichita and " such other tribes or bands of Indians as the Government " may desire to locate therein; **excluding,** however, all the " Indians of New Mexico, and also those whose usual " ranges at present are north of the Arkansas river, and " whose permanent locations are north of the Canadian " river, but including those bands whose permanent ranges " are south of the Canadian or between it and the Arkansas; " which Indians shall be subject to the exclusive control " of the United States, under such rules and regulations, " not inconsistent with the *rights* and *interests* of the Choc- " taws and Chickasaws, as may from time to time be pre- " scribed by the President for their government: Provided, " however, the territory so leased *shall remain open to* " *settlement by Choctaws and Chickasaws as heretofore.*

"ARTICLE 10. **In consideration** of the foregoing relin- " quishment and lease, and as soon as practicable after " the ratification of this convention, the United States will " pay to the Choctaws the sum of six hundred thousand " dollars, and to the Chickasaws the sum of two hundred " thousand dollars, in such manner as their general coun- " cils shall respectively direct."

Under the authority of these articles the Government of the United States made provisions for the Wichita and Affiliated Bands in 1859. The Acting Commissioner of Indian Affairs on March 30, 1859, instructed the Superintendent within whose charge the Leased District lay as follows: "Fix upon a suitable location for the "Wichitas and make such examination of the country as "will enable you to determine the proper places for locating "and colonizing the Texas and other Indians which it is "intended to place within that district. In carrying out "this policy, the different bands, so far as they cannot be "united, ought to be located upon distinct reservations, "with circumscribed limits, containing **only so much** "**land** as may be *necessary* for their actual *occupancy and* "*use.*" . . . "So soon as it may be practicable and safe "for the Wichitas to remove to their new locations, you "will require them to go there, giving them to understand "that it is to be their permanent home." . . . "The same "understanding must be impressed upon the other In-"dians." On September 20, 1859, the Agent reported that he had made the selection (Sec. of Int. Rept. 1859, pages 382–3; also 533, 633), amounting to 154,240 acres, including pasture lands. The Agents of the United States made no treaty with these people in 1859, but the promise was made that they should enjoy the use of so much of this land as was set apart at that time. These Indians surrendered in Texas nothing of value either to themselves or to the Government since they had no defined reservation and no recognized rights in the State of Texas, having been purely nomadic and never sufficiently long established in any place or of sufficient numerical strength to justify any treaty with either the Spanish, Texan, or United States Government defining any area to which they were recognized as having even the right of occu-

pancy. Immediately after the Superintendent had set aside this reservation of 1859, the Civil War arose and the Wichitas fled to Kansas and did not return to the Leased District until 1867. (Report of Com. Ind. Aff. 1867, p. 23.)

The preamble recites that "**the United States desire** " that the *Choctaw Indians*" "*make provision* for the " permanent settlement, WITHIN the CHOCTAW COUNTRY, of " the Wichita and certain other tribes or bands of Indians, " FOR WHICH PURPOSE the Choctaws and Chickasaws are " willing to LEASE, **on reasonable terms,** to the United " States."

The desire of the sovereign was always a controlling force with the Choctaws, and they made the lease, with the understanding it should be "**on reasonable terms.**"

Manifestly, until it was determined *to what extent* the United States would need to use this land, what number of acres would be required for the Wichitas and the other described Indians, and what number of Indians could be located thereon, it was impossible to measure the terms which would be *reasonable.* It was of course possible that the United States would have difficulty and might be unable to locate many Indians permanently on such lands, and therefore the amount actually paid in 1855 was not unreasonably small. But on the theory the United States intended to get permanent possession of 7,713,000 acres it would have been unreasonable and fraudulent and contrary to the preamble describing the intent of parties. Twelve years transpired before the United States had made any location except the Wichitas, who, on " reason- " able terms," would not have occupied land worth ~~$800,000~~ exceeding $400,000.

The agent on September 20, 1859, selected for them only 154,240 acres out of the 7,713,239 acres in the Leased District, worth then only about $154,240.

If, however, the Government had located Indians so as to embrace permanently an area of value "on reasonable "terms" in excess of the $600,000, it would have been the manifest duty of the sovereign to have made a settlement on such terms as should have been "reasonable."

The Choctaws and Chickasaws retained the right of settlement as theretofore, but it would have been unreasonable for them to have occupied the whole of it and excluded the Government in this manner from locating other Indians.

Equally unreasonable would it have been for the United States to take it all without an adequate compensation and thus have prevented "settlement by the Choctaws "and Chickasaws" as theretofore.

The Choctaws agreed to lease on "reasonable terms," it being uncertain what use the Government could or would make of such land or to what extent the reserved rights of the Choctaws and Chickasaws might be diminished. The Government paid down $600,000 for the general privilege of locating Indians under this lease which the Choctaws agreed to make "on reasonable terms," leaving the question of settlement to depend on the extent to which the land was used and to the **good faith and justice** of the sovereign. The Government, of course, believed it would use $600,000 worth of this land, because there were three or four thousand Indians they wished to locate whose ranges were south of the Arkansas river, and was therefore justified in paying this sum.

By the treaty of 1855 the Choctaws and Chickasaws retained the right to settle within, and the legal title to, the Leased District, and jurisdiction therein, and the United States acquired only the right to locate a certain particular class of Indians within that portion of the Choctaw country "under such rules and regulations not inconsistent

" with the *rights* and *interest* of the Choctaws and Chick-
" asaws." The Choctaws continued to exercise the same political control and government within the Leased District as it had exercised previously to the lease of 1855. This alleged lease should have been designated not a *lease* but a *permit*. This district was designated Hotubbee District. (See the Choc. Const. of 1861 ; 7, 8, 13 Choct. Laws of 1869 ; Art. 3, Treaty of 1855.)

### Choctaws Retain Jurisdiction.

The first article of the treaty of 1855 described the boundaries of the Choctaw and Chickasaw country, **expressly included the leased district,** provided it should remain Choctaw and Chickasaw country and that no part of the land embraced therein shall ever be sold without the consent of both tribes. Article 2 set apart the land assigned the Chickasaws, and Article 3 declared that the remainder of the country held in common by the Choctaws and Chickasaws should constitute the Choctaw District. The Choctaws retained jurisdiction of the leased district, or as they called it, "*Hotubbee District*," and had occasion to pass through the Chickasaw country in the exercise of their authority over the leased district, Article 3 therefore granted the officers of the Choctaw Nation *the right of safe conduct and free passage through the Chickasaw District*, and Article 7 of the treaty of 1855 pledged to the Choctaws the *unrestricted right of self-government within their respective limits, which included the limits of the land described in Article 3 as the Choctaw District*, and embraced the leased district, called by the Choctaws, "Hotubbee District." The Choctaws divided their country into four districts. Under their constitution the Supreme Court had jurisdiction of the three Eastern dis-

tricts and until *Hotubbee District* should be duly organized and officers elected therein (Art. 4, Sec. 2), and Art. 7, Sec. 1. General Provisions, provided "until Hotubbee Dis- "trict shall be duly organized the Principal Chief of the "Choctaw Nation shall exercise such authority over the "citizens of this nation living in that District as he might "deem expedient for the protection of persons, life and "property."

The United States neither objected to nor had occasion to object to this exercise by the Choctaw Nation of the right of government within the leased district, so called, and such rights and interests as might have grown up within the leased district of the Choctaws and Chickasaws constituted a limitation upon the rights of the United States which could only permit other particular Indians to enter, on conditions that such entry should not be inconsistent with the *rights and interests* of the Choctaws and Chickasaws in such country. Under the terms of the so-called lease of 1855, the Choctaws and Chickasaws could have practically taken possession of the whole of the leased district. The rights which the United States acquired therein for permitting settlement of a certain limited class of Indians, on reasonable terms, under rules and regulations not inconsistent with the rights and interests of the Choctaws and Chickasaws, who retained the same right of settlement as they previously enjoyed, retaining also the right of government within that district, were not very important and were attended with such conditions that it partly accounts for the small amount paid for the lease aforesaid.

The Government paid the Choctaws $400,000.00 for the lease and the relinquishment of the land west of the 100th meridian, the Choctaws having demanded $400,000.00 for the lease, ~~and the Chickasaws being paid $200,000.00 for their interest in the lease, the~~ lease actually cost the

United States $400,000.00, and the relinquishment of the land west of the 100th meridian actually cost $400,000.00. (See Sen. Ex. Doc. 13, 48th Congress, first session, p. 15; Choc. Nation *v.* U. S., 1292–1295.) The lease, therefore, cost less than ten cents an acre for the use of the land from 1855 to 1866, eleven years; or less than one cent an acre per annum for the franchise within such property. The Wichitas, the Kiowas, Comanches, and Apaches now occupying about half of this Leased District outside of the land they themselves use, received for leases for cattle grazing upon less than half of this area exceeding $200,000.00 during the single year of 1898, as shown by the report of the Commissioner of Indian Affairs. (Report Com. Ind. Affrs. 1898, page 56), so that $400,000 for the use of twice this area for eleven years would be less than one-seventh the rate which such land is actually earning now under lease for grass only.

Attention is called to this question of value to show that the United States had received full value for the money paid in 1855 for the lease when the treaty of 1866 was entered into. The officials charged with the control of Indian affairs drove an exceeding hard bargain in the treaty of 1855, in requiring the Choctaws to execute a relinquishment to the lands west of 100th meridian ceded to the Choctaws in 1820, amounting to exceeding 6,589,440 acres. At any fair valuation of this great property it was worth more than the entire consideration paid for both the lease and relinquishment of 1855. In considering the equitable rights of the Choctaws, a weak and dependent people, it is manifest that the United States, at the time of the treaty of 1866, had received more than full value for the $800,000 paid the Choctaws and Chickasaws in 1855. The United States, in seeking the relinquishment of 1855, concedes the fact of the concession of 1820.

The history (Choctaw Nation *v.* U. S., 1292 *et seq.*) shows that the Choctaws made an unavailing effort to get the officials of the United States to do that justice which the high character of the Federal Government for integrity and justice made imperatively the duty of these officials to accord. The helpless condition of the Choctaws and Chickasaws compelled the assent of these Indians to a settlement in the treaty of 1855 which merits special attention at the hands of that great court in which alone the dealings of the United States with the Indians has been beyond reproach. The full history is set forth in the record of the Choctaw Nation *v.* U. S.

## The Cession of 1866.

On the 28th day of April, 1866, the Choctaws and Chickasaws entered into a treaty with the United States. The third article of said treaty is as follows (14 Stats. 769):

"Article 3. The Choctaws and Chickasaws, in consid-
"eration of the sum of three hundred thousand dollars,
"hereby *cede to the United States* the territory west of
"the 98° west longitude, known as the *Leased District*, pro-
"vided that the said sum shall be invested and held by
"the United States, at an interest not less than five per
"cent., in trust for the said Nations, until the legislatures
"of the Choctaw and Chickasaw Nations, respectively,
"shall have made such laws, rules, and regulations as
"may be necessary to give all persons of African descent,
"resident in the said Nations at the date of the Treaty of
"Fort Smith, and their descendants, heretofore held in
"slavery among said Nations, all the rights, privileges,
"and immunities, including the right of suffrage, of cit-
"izens of said Nations, except in the annuities, moneys,
"and public domain claimed by, or belonging to, said
"Nations respectively; and also to give to such persons

" who were residents as aforesaid, and their descendants,
" forty acres each of the land of said nations on the same
" terms as the Choctaws and Chickasaws, to be selected
" on the survey of said land, after the Choctaws and
" Chickasaws and Kansas Indians have made their selec-
" tions, as herein provided; and immediately on the
" enactment of such laws, rules, and regulations, the said
" sum of three hundred thousand dollars shall be paid to
" the said Choctaw and Chickasaw Nations in the propor-
" tion of three-fourths to the former and one-fourth to
" the latter—less such sum, at the rate of one hundred
" dollars per capita, as shall be sufficient to pay such per-
" sons of African descent before referred to as within
" ninety days after the passage of such laws, rules, and
" regulations shall elect to remove and actually remove
" from the said nations respectively. And should the
" said laws, rules, and regulations not be made by the
" legislatures of the said nations, respectively, within two
" years from the ratification of this treaty, then the said
" sum of three hundred thousand dollars shall cease to
" be held in trust for the said Choctaw and Chickasaw
" Nations, and be held for the use and benefit of such of
" said persons of African descent as the United States
" shall remove from the said Territory in such manner as
" the United States shall deem proper, the United States
" agreeing within ninety days from the expiration of the
" said two years to remove from said nations all such
" persons of African descent as may be willing to remove;
" those remaining or returning after having been removed
" from said Nations to have no benefit of said sum of
" three hundred thousand dollars, or any part thereof,
" but shall be upon the same footing as other citizens of
" the United States in the said Nations."

The Choctaws and Chickasaws in this article cede to the United States the leased district. The consideration named is $300,000. The Choctaws and Chickasaws are to have the consideration only contingently upon their giving forty acres of their land to each of the Choctaw

and Chickasaw freedmen, and in the event that the freedmen should elect to move, and actually remove from said Nations, then out of such $300,000.00 should be paid $100.00 to each such freedman as chose to remove from the Choctaw and Chickasaw Nations. There was at that time 3,000 freedmen, and if they had all elected to remove, it would have consumed the alleged consideration, $300,000.00, and instead of the Choctaws and Chickasaws receiving an actual consideration of $300,000.00 in exchange for the cession of 7,713,000 acres, they would have been compelled to pay the entire alleged consideration of $300,000.00 to the freedmen and 7,713,000 acres of their land to the United States without receiving any benefit in exchange. In that event they would have given up 7,713,000 acres of land, in addition to relinquishing the alleged consideration under this article. Such a transaction would have been grotesque. If the guardian intended by this transaction to acquire the full title of this property, it would have been a manifest fraud and robbery of these people. No man can be heard to charge such a crime against the United States. The Government of the United States is incapable of such ungenerous treatment of a defenceless ward.

## The Relation of the United States to the Choctaw Nation is that of a Superior to an Inferior.

The relation of the United States to the Choctaws and Chickasaws is that of sovereign. The Government bears the same relation to all of the Five Civilized Tribes; not only by necessary implication but by direct contract.

On January 3, 1786 (7 Stats. 21), by treaty, the Commissioners plenipotentiary of the United States of America contracted to

"Give peace to all the Choctaw Nation and receive
" them into the favor and *protection* of the United States
" of America."

The treaty further stipulates as follows:

"Article 2. The Commissioners Plenipotentiary of all
" the Choctaw Nation do hereby acknowledge the tribes
" and towns of the said nation, and the land within the
" boundary allotted to the said Indians to live and hunt
" on as mentioned in the third article, to be under the
" *protection* of the United States of America, and of no
" other *sovereign* whosoever."

The Chickasaws, in like manner, January 10, 1786 (7 Stats. 24), were guaranteed the same protection and acknowledged the same sovereign. Article 2 is identical *mutatis mutandis*.

The Cherokees, on November 28, 1785 (7 Stats. 18), in like manner, were guaranteed protection and acknowledged the same sovereign. Article 3d of that treaty being identical with the one above quoted *mutatis mutandis*.

The Creeks, in like manner, on August 7, 1790 (7 Stats. 35), were pledged the same protection and acknowledged the same sovereign. Article 2d of that treaty being identical *mutatis mutandis*.

These people were practically moved from the east to the west at the same time from 1830 to 1836, and the act of Congress authorizing the removal reiterates assurance of protection by section 6 of said act and section 7 of said act is as follows:

"And be it further enacted, That it shall and may be
" lawful for the President to have the same superintend-
" ence and care over any tribe or nation in the country to
" which they now remove as contemplated by this act,

"that he is now authorized to have over them." (U. S. Stats. 4, p. 411.)

The treaties with the five tribes removing them from the east to the west show that **the policy of the Government was identical as to them all severally.**

The Choctaw treaty (7 Stat. 333) of September 27, 1830, cedes all the land east of the Mississippi river, and the Choctaws conform to the wish of the Government taking the land assigned to them in the southern part of Indian Territory.

The Chickasaws (7 Stats. 381), October 20, 1832, cede all their land east of the Mississippi river and agree to move west making a union with the Choctaws in 1837 under the guidance of the United States.

The Creeks (7 Stats. 366), March 24, 1832, cede all their land east of the Mississippi river and take the land assigned them in central Indian Territory.

The Seminoles (7 Stats. 369), on May 9, 1832, cede all their land east of the Mississippi river and, under the guidance of the United States, obtain a portion of the Creek land in the central portion of Indian Territory.

The Cherokees (7 Stats. 414 & 478) by treaties of February 14, 1833, and December 29, 1835, ceded all their land east of the Mississippi river and went to the land in the northern part of Indian Territory. Over 16,000 Cherokees protesting against the treaty and refusing to move were placed under arrest by Gen. Scott with an army of soldiers and compelled to move by force. **The sovereign acted in its capacity as sovereign.**

The treaties of 1866, in like manner, were made with these five nations, being negotiated at the same time, to wit, September, '65, and completed within four months of each other, from March to July, 1866. These treaties

were made for a common purpose, among others, the cession of a part of their western land to the United States to be purchased for the use of other Indians the Government might desire to colonize thereon. **These treaties were made for the same purpose in pursuance of the same design and under a fixed identical policy.**

The Seminoles made their treaty first, March 21, 1866, (14 Stats. 755) and ceded their western land "in compli-"ance with the desire of the United States to locate other "Indians and freedmen thereon," and used the term "cede "and convey." Congress, nevertheless, March 1st, 1889, construed the cession, although absolute on its face, to be a trust conveyance, and paid them for their equitable title.

The Choctaws and Chickasaws made the next treaty (14 Stats. 769) on April 28, 1866, using the language that they "cede to the United States the territory west of the "98° W. Longitude, known as the Leased District," in Article 3, which was long enough and complicated enough and with conditions and provisos and contingencies sufficiently involved to have completely befogged the most educated Choctaw.

The Creeks made the third treaty (14 Stats. 786) on June 14, 1866. They ceded their western lands also, but put in the phrase that such lands were "to be sold to and "used as homes" for friendly Indians. This cession was held by Congress to be a trust conveyance by act of March 1st, 1889, and the Creeks were paid the full value of their equitable title.

The Cherokees made the fourth and last of these treaties (14 Stats. 799) on July 19, 1866, in which they set up more completely and fully the purposes of the treaty stipulating that the lands west of 96 might be used by the United States for settling friendly Indians. (Articles

15 and 16). The land to be taken in compact form not exceeding 160 acres to each Indian, and to be paid for in a stipulated manner, etc. Under this agreement the Cherokee Nation on June 14, 1883, executed formal deeds to the United States in trust for the following tribes, to wit: The Osages, the Pawnees, the Poncas, and the Otoes and Missourias, having been instructed to do so by act of Congress of March 3, 1883. Notwithstanding these trust conveyances, Congress bought and paid for the full equitable title on March 3, 1893, paying $8,595.736.12 (27 Stats. 640). In like manner the treaty of 1866 with the Choctaws and Chickasaws was construed by Congress March 3, 1891, to be a trust conveyance, and they were paid in the same manner and at the same rate as the Creeks and Seminoles for that portion of the Leased District which was thrown open to white settlement and which had previously been occupied by the Cheyennes and Arapahoes.

The United States has recently exercised its **sovereign** authority by destroying the tribal governments and compelling them to enter into agreements for the distribution of the tribal property. It is well known as an historical fact that these Indians would never have consented to the very recent agreements entered into with the United States except for the reason that they recognized in the expressed wish of the Government the demand of their sovereign, whose power over them was absolute and whose wishes they could not disregard.

In making the treaty of amity and peace of September 10, 1865, the tribes were required to "acknowledge themselves under the *protection* of the United States" and recognize "their treaties with the Government in full "force." The United States at this time renewing its pledge of protection and recognizing the treaties of past

years in full force and guaranteeing "the security of the " persons and property of the respective nations or tribes."

The sovereignty of the United States over the Indians and their right to pass laws controlling the Indians and their property has been repeatedly passed on.

U. S. *v.* Holliday, 3 Wall. 420.

Cherokee Tobacco *v.* U. S., 11 Wall. 619.

U. S. *v.* Sariviere, 93 U. S. 193.

U. S. *v.* Kagama, 118 U. S. 375.

It has been suggested that the relation of guardian and ward could hardly be plead in behalf of these Indians because of their superior enlightenment, education, and general civilization. It is true that in isolated cases members of the Five Tribes were, even in 1866, educated men, but it is also true that the great body of these people and their leaders were not educated men; that even their spokesmen at this Council of the West and Southwest at Fort Smith in September, '65, were not educated. It will be seen (Commissioner of Ind. Aff. Report, 1865, p. 338) that one of the Chickasaw commissioners signed by mark, and that they required an interpreter because they did not understand the English language. The legislatures both of the Choctaw and Chickasaw nations, even to this day, 1899, are unable to transact business in the English language without the use of interpreters.

The relation of the United States, however, to these people has been thoroughly established as the relation of domestic dependent tribes entirely at the mercy and subject to the control and direction of the United States.

The United States has required of them, and each of them, to remove from their homes east of the Mississippi River, depart from the land where they

had buried their dead and to which they were strongly attached, and go west of the Mississippi River. When the Government would appear to negotiate the various treaties requiring the removal of the Choctaws and Chickasaws from the east of the river to the west, the Indians felt the presence and the power of an imperial hand and, making the best terms they could, invariably consented to the wish of the sovereign power. In the case of the Cherokees where 16,000 of these people protested against the treaty of '35 and declined to remove, General Scott, in charge of an army, placed them under arrest and caused their departure by force of arms, and it is thoroughly well understood as historically true, these people, and all of these people without exception, occupy a position of absolute political dependence and that a relation similar to that of guardian and ward between them and the United States is thoroughly well established. The Government for a century has held their funds in the Treasury and is even now in the act of dividing up their landed estate among their citizens with and without their consent (April, 1899).

The relation of the United States to the Choctaw Nation was considered by the Supreme Court in the case of the Choctaw Nation *v.* United States (119 U. S. 1, 28), in which the Court said:

"The recognized relation between the parties to this "controversy, therefore, is that between a superior and "an inferior, whereby the latter is placed under the con- "trol of the former, and which, while it authorizes the "adoption, on the part of the United States, of such a "policy as their own public interests may dictate, recog- "nizes, on the other hand, such an interpretation of their "acts and promises as justice and reason demand, in all "cases where power is exerted by the strong over those "to whom they owe care and protection. The parties

" are not on an equal footing; and that inequality is to " be made good by the superior justice which looks only " to the substance of the right, without regard to the " technical rules," etc.

Attorney General Taney says (2 Opin. Atty. Genl.):

" In an instrument of this sort, and made with such " persons as the Choctaws, I do not think that strict and " technical rules of construction should be applied to it. " It ought to be expounded liberally according to its spirit, " so as to give the Indians all the advantages and facili- " ties, in their removal, which appear to have been con- " templated by the general scope and spirit of the treaty."

Chief Justice Marshal, in Worcester *v.* Georgia, 6 Peters, 515, says:

" How the words of the treaty were understood by this " unlettered people, rather than their critical meaning, " should form the rule of construction."

And in the case of the Kansas Indians, 5 Wall. 737, the Court said:

" Enlarged rules of construction are adopted in refer- " ence to Indian treaties. In speaking of these rules, " Chief Justice Marshall says: 'The language used in " ' treaties with the Indians shall never be construed to " ' their prejudice; if words be made use of which are sus- " ' ceptible of a more extended meaning than their plain " ' import, as connected with the tenor of the treaty, they " ' should be considered as used only in the latter " ' sense.' "

For this reason no construction can be placed upon the Third Article of the treaty of 1866, which would place the United States in the attitude of appropriating for its own use a piece of property easily worth ten millions of dollars

without any compensation to the Choctaws and Chickasaws.

## The Negotiations at Fort Smith, 1865.

Fortunately, the meaning of the Third Article is not left in doubt, because the history of the transaction, shown not by the records of the Choctaw Nation, but by the records made by the officers of the United States, clearly and forcibly demonstrate that it was not proposed to acquire the ownership of this property by the treaty of '66, but that the leased district was ceded to the United States for the purpose of *being set apart to be purchased* for the use of friendly tribes now in Kansas and elsewhere *on such terms as might be agreed upon by the parties* and approved by the Government, or such as might be fixed by the Government.

On September 8, 1865, at Fort Smith, Arkansas, the United States Commission, D. N. Cooley, president, Hon. Elijah Sells, Thomas Wistar, Brigadier General W. S. Harney, U. S. A., Col. Eli S. Parker, of Gen. Grant's Staff, Mr. Cooley being not only president of the Commission, but also the Commissioner of Indian Affairs, opened a council with the Indians of the West and Southwest for the purpose of making treaties of peace and amity with them, to wit: The Choctaws and Chickasaws, the Cherokees, Creeks and Seminoles, the Osages, the Senecas, and Shawnees, the Wyandottes and Quapaws, the Wichitas and Comanches, etc. The Indian Agents for the Choctaw, Chickasaw, and the other tribes were present.

This Council was one of great importance for the purpose of bringing about peace on the border not only between the United States and these tribes, but between the tribes themselves which were divided into inter-tribal war.

The Commissioners of the United States at this meeting drew up a treaty of peace and amity on the 10th of September, 1865, which these Indians were all required to sign, and which they all did sign. This treaty expressly declared in *consideration* of the negotiations of peace and amity, "It is the desire of the Government to "act with *magnanimity*," and the United States did promise then and there to "re-establish peace and friend- "ship with all the nations and tribes of Indians within "the limits of the so-called Indian Country; *that it will* "*afford ample protection for the security of the persons* "*and property* of the respective Nations or Tribes," and declared its "willingness to enter into treaties and "arrange and settle all questions relating to and growing "out of former treaties," &c. (Report of Com. Ind. Aff. 1865, p. 302.)

On Thursday, September 21, 1865 (p. 311 same), "The "Committee on the part of the United States Com- "mission submitted the form of a treaty for the consider- "ation of the Choctaw and Chickasaw delegations and "proposed, instead of reading the same to the Council, "to submit it to the Committee appointed on the part of "those delegations; and, to give them an oportunity to "consider it, the Council adjourned to meet at two o'clock "that afternoon. The Council accordingly convened, "being called to order by myself (Com. of Indian Affairs "Cooley). Commissioner Parker stated that the joint "committee of Choctaw and Chickasaw delegations had "reported to the Committee of the Commission certain "amendments and *modifications* of the proposed treaty; "that the Committee had had the same under considera- "tion and the Commission *declined to accede to them or* "*to change in any respect the treaty as submitted.* The "delegations would be furnished with a copy of the

"treaty, and whenever *they determined to approve it*, by "notifying the Commissioner of Indian Affairs of the "fact, they would be invited to come to Washington to "consummate the treaty."

This historical sketch by the Commissioner of Indian Affairs of the manner in which the Choctaw treaty was drawn up for the action of the Choctaw and Chickasaws without allowing them to change it in any respect and that they would be only allowed to come to Washington to consummate it when they had determined to approve the treaty precisely as it had been drawn up by the United States Commission is convincing proof that the United States was acting in the premises *as sovereign;* that it was the action of a guardian with his ward; the action of a superior to an inferior, and that the relation of guardian and ward did actually exist and was recognized to exist.

It will be observed that Commissioner Cooley in opening the council (see page 297 same) treated *the Indians as children* and the Government as the Great Father of these red children, and he says to them: "*Brothers*, "you will listen further: *your Great Father*, the Presi- "dent, hearing that the Indians in the Southwest desired "to meet Commissioners sent by him in council to renew "their allegiance to the United States and to settle diffi- "culties among themselves which have arisen in conse- "quence of a portion of the several tribes uniting with "wicked white men who have engaged in war, has sent "the Commissioners now before you to hear and consider "any matter which you may desire to lay before us, and "to make a treaty of peace and amity with all *his red* "*children* who may desire *his favor* and *protection*."

President Cooley explained to the Indians that the new treaty must contain substantially the following stipu-

lations, and in his report, (Rept. Com. Ind. Aff., 1865, pp. 298, 318) says:

"Such treaties must contain substantially the following stipulations:

"1. Each tribe must enter into a treaty for permanent peace and amity with themselves, each nation and tribe, and with the United States.

"2. Those settled in the Indian Territory must bind themselves, when called upon by the Government, to aid in compelling the Indians of the plains to maintain peaceful relations with each other, with the Indians in the Territory and with the United States.

"3. The institution of slavery which has existed among several of the tribes must be forthwith abolished, and measures taken for the unconditional emancipation of all persons held in bondage, and for their incorporation into the tribes on an equal footing with the original members, or suitably provided for.

"4. A stipulation in the treaties that slavery, or involuntary servitude, shall never exist in the tribe or nation, except in punishment of crime.

"5. A portion of the lands hitherto owned and occupied by you must be set apart for the friendly tribes in Kansas or elsewhere, on such terms *as may be agreed upon by the parties* and approved by Government, or such as may be fixed by the Government.

"6. It is the policy of the Government, unless other arrangement be made, that all nations and tribes in the Indian Territory be formed into one consolidated government, after the plan proposed by the Senate of the United States in a bill for organizing the Indian Territory.

"7. No white person, except officers, agents, and employes of the Government, or of any internal improvement authorized by the Government, will be permitted to reside in the Territory, unless formally incorporated with some tribes, according to the usages of the band."

The same language is set forth on page 318 in the minutes of Charles E. Mix, Secretary.

In making his report to the Secretary of the Interior the Commissioner of Indian Affairs restates these stipulations in briefer language and in terms which help to explain the understanding he had with regard to their significance (page 34 same) and says :

"On the next day the delegates were informed that the "Commissioners were empowered to enter into treaties "with the several tribes upon the basis of the following "propositions :

"First. That each tribe *must enter* into a treaty for per- "manent peace and amity among themselves, with each "other as tribes, and with the United States.

"Second. The tribes settled in the Indian Country to "bind themselves at the call of the United States authori- "ties to assist in compelling the wild tribes of the plains "to keep the peace.

"Third. Slavery to be abolished and measures be taken "to incorporate the slaves into the tribes with their rights "guaranteed.

"Fourth. A general stipulation as to final abolition of "slavery.

"Fifth. A part of the Indian Country *to be set apart*, "*to be purchased for the use* of such Indians, from Kansas "or elsewhere, as the Government *may desire to colonize* "*therein.*

"Sixth. That the *policy* of the Government *to unite all* "*the Indian tribes* of this region into *one consolidated* "*government* should be accepted.

"Seventh. *That no white person* except Government "employes or officers or employes of internal improve- "ment companies authorized by Government *to be per-* "*mitted to reside* in the country, unless incorporated with "the several nations.

"Printed copies of the rules of the commission involv- "ing the above **propositions** were placed in the hands of "the agents and of members of the tribes."

## Proposition 5 and Stipulation 5.

A critical examination of "stipulation five" as explained by Commissioner of Indian Affairs Cooley in his annual report under the term "proposition five" is instructive. Taken together, stipulation 5 as construed by proposition 5 would read as follows: "A part of the Indian Country," to wit, "a portion of the lands hitherto owned and occu- "pied by you," must "be set apart" "to be purchased for "the use of such" friendly "Indians from Kansas or else- "where" "as the Government may desire to colonize "therein," "*on such terms*" of *purchase* "as may be agreed "upon by the parties" and "approved by the Government, "or upon such terms as may be fixed by the Government."

Stipulation 5, which requires that lands should be set apart for friendly tribes on such terms as may be agreed upon by the parties, meant upon such terms *of purchase* as may be agreed upon by the parties, and this procedure was followed in the case of the Delawares and Shawnees, who were incorporated into the Cherokee Nation upon terms which the Delawares and Shawnees at different times and places agreed upon with the Cherokee Nation and which the Government approved.

For example, the Delawares paid the Cherokees $157,600 for 157,600 acres of land under articles of agreement of 8th of April, A D. 1867. (Pp. 367 Cherokee Statutes of 1892.)

The preamble of this agreement recites:

"Whereas, by the 15th Article of a certain treaty "between the United States and the Cherokee Nation, "ratified August 11, 1866, certain terms were provided, "under which *friendly Indians* might be settled upon "unoccupied lands in the Cherokee Country, East of the "line of 96° of West longitude, *the price to be paid for*

"*such lands to be agreed on by the Indians to be thus* "*located* and the Cherokee Nation subject to the approval " of the President of the United States; and, whereas, " by a treaty between the United States and the Delaware " Tribe of Indians, ratified August 10, 1866, the removal " of the said Delawares to the Indian Country, South of " Kansas, was provided for, and in the 4th Article whereof " an agreement was made by the United States to sell to " the Delawares a tract of land, being part of a tract the " cession of which by the Cherokees to the United States " was then contemplated; and, whereas, no such cession " of land was made by the Cherokees to the United States, " but, IN LIEU THEREOF, *terms were provided* as hereinbefore " mentioned, *under which friendly Indians might be* " *settled on their lands*," &c.

The Shawnee agreement in like manner (p. 404 *ibid.*) recites the Treaty of 1866 and states that such lands may be settled "*on such terms* as may be agreed upon *by any* "*such tribe* and the Cherokees, subject to the approval of " the President," etc.

In the event that the parties had been unable to agree, then, as for example, under the terms of the Cherokee treaty, the Government could have fixed the terms of purchase. In pursuance of this clear-cut plan, the settlement of every new tribe in Indian Territory, almost without exception, was arranged.

In the case of the *Osages*, the Government of the United States made an arrangement with the Cherokees and *bought* lands, as did also the *Pawnees*, *Otoes* and *Missourias*, *Poncas*, *Nez Perces* and *Tonkawas*.

Under this stipulation or proposition as set forth in the Creek Treaty, Article 3, the *Seminoles*, *Sacs and Foxes* and *Pawnees* bought. Under the *Seminole* treaty, proposition 5, set forth in Article 3, was the basis upon which the *Pottawatomies* and *absentee Shawnees* acquired lands,

and under Article 3 of the Choctaw-Chickasaw Agreement, the Choctaws and Chickasaws insist that the land was ceded for like purpose and that the Wichitas and Kiowas, Comanches and Apaches have acquired rights there in like manner, and that either they or the United States for them should compensate the Choctaws and Chickasaws for this land which was set apart and ceded to the United States "*to be purchased*" "for the use" of these friendly Indians.

In the Choctaw treaty, Article 30, it was agreed that civilized Indians north of Indian Territory not exceeding a certain number, should have the right of being incorporated in the Choctaw and Chickasaw tribes as fellow citizens, to select 160 acres of land each in case the public domain was divided, and in Article 31 it was expressly agreed that the United States would pay to the Choctaw and Chickasaw Nations "out of funds of Indians removing into said Nations, respectively, under the provisions of this treaty, such sums as may be fixed by the legislature of said Nation, not exceeding $1.00 per acre."

In the unsigned treaty between the Commissioners and the Choctaws and Chickasaws attention is called to Article 5, which expressly shows the purpose which the United States Commissioners had in mind in negotiating the treaty of 1866. Article 5 reads as follows, to wit:

"ARTICLE 5. The Choctaw and Chickasaw Tribes agree to a modification of the 9th article of the treaty concluded at the city of Washington the 22nd day of June, A. D. 1855, by which they agree that all that portion of their common territory west of the 98th degree west longitude, leased to the United States, *may be used for* the permanent settlement of the Wichita and such other tribes or bands of Indians as the Government desires to locate thereon, *without exception or restriction as to the character of the tribe.*"

The other limitations on the right of the United States were manifestly not intended to be changed by the U. S. Commissioners at this time, and nothing has been anywhere shown in the record to indicate any change of purpose on the part of the Commissioners, or to indicate that they had any other purpose when they drew the third article of the treaty of 1866 ceding the Leased District to the United States, while the record does show conclusively that they did understand the treaty as drawn to make only a cession in trust.

Article 5 in the proposed treaty at that time (September, 1865,) shows beyond any reasonable doubt that the Government Commissioners had no intention of doing more than modifying the Ninth Article of the Treaty of '55 so as to permit the Government to locate other tribes or bands without exception or restriction as to the character of the tribe. The Ninth Article aforesaid having previously restricted the Indians to be located on such lands to those whose permanent locations were south of Arkansas River. Under the fifth proposition or stipulation arrangement was made with the Choctaws for the location of Kansas Indians within their borders and in case the Choctaws determined to allot their country east of 98, these Kansas Indians were to have the right of selection of 160 acres each **after** the Choctaws had selected their allotments (Article 30, Treaty '66), and the United States agreed to pay not exceeding $1 an acre for such land so selected by such Kansas Indians "out of the funds of In-"dians removing into said Nation, respectively, under the "provision of this treaty." The same arrangement was made subsequently with the Cherokee Nation in the treaty of 1866, Article 15 (14 Stats. 803), upon the clearly defined principle that the immigrant Indians should pay for the lands they received upon such terms as such

immigrant Indians and the Cherokee Nation should agree, "subject to the approval of the President of the United "States, and in case of disagreement the price to be fixed "by the President." Under this provision the Delaware Indians settled in the Cherokee Nation as stated, and paid the Cherokee Nation $157,600 for 157,600 acres of land for the registered Delawares. In like manner the Shawnees settled, as stated, in the Cherokee country upon a similar basis. Commissioner of Indian Affairs Cooley distinctly reports (Rep. 1865, p. 36) that "with the "Choctaws and Chickasaws a treaty was agreed upon "*upon the basis of the seven* **propositions** *heretofore* "*stated.*"

On page 32 of same report, W. S. Paton and Robert S. Paton submit a reply to the Commissioners as follows: "Honorable Commissioners of the United States: We, "the delegation on the part of the loyal element of the "Choctaw people, . . . for answer therefore to your prop- "osition to the Civilized Tribes of Indians, we say that the "first, second, third, fourth, fifth, and sixth articles meet "our approval. . . . Wm. S. Paton, Robert B. Paton."

It will be seen that there is no substantial difference in the meaning of stipulation 5 and the proposition 5 as stated by Commissioner Cooley on page 34 of the annual report above quoted.

It will be observed that proposition 5, to wit:

"5th. A part of the Indian country to be set apart, "to be purchased for the use of such Indians, from Kan- "sas or elsewhere, as the Government may desire to "colonize therein."—

has four qualifying clauses:

1. To be set apart
2. To be purchased

3. For the use

4. Of such Indians, &c.

These qualifying clauses are of extreme importance to explain the intention of parties. The Commissioner of Indian Affairs says (page 35, *ibid.*) that printed copies of this address of the commissioners involving the above **propositions** were placed in the hands of the agents and of the members of the tribes, and he uses the above language as involving the same meaning as expressed in the record of the proceedings at Fort Smith, by *stipulation* 5 (p. 319), above quoted.

The difference between these two forms of expression is that stipulation 5 uses the word "friendly," while proposition 5 omits that term. Proposition 5 says the land is **to be purchased** for the use of such Indians, while stipulation 5 says that the land is to be set apart **"on such terms as may be agreed upon by the parties and approved by the Government,"** which means the *purchase* terms were to be agreed upon between the Choctaws and Chickasaws and the Indians who might wish to buy, or upon such terms of purchase as may be fixed by the Government in the event that the Government acted for the Indians who desired to purchase homes upon such western lands.

The history of the western lands of the Cherokees, Creeks, Seminoles, Choctaws, and Chickasaws, above recited, shows that in some cases the terms were agreed upon by the parties who desired such land so set apart to be purchased, as in the case of the Seminoles, who paid $200,000 for land set apart to be purchased out of the Creek western lands; while, in the case of the Osages, the Cherokee Nation, on June 14, 1883, conveyed the Osage reservation to the United States in trust for the benefit of the Osage and Kansas Indians. The manner in which this could be

lawfully done is more particularly set forth by the terms of the Cherokee treaty above quoted. Suffice it to say, however, that the stipulations of the Cherokee treaty were practically carried out in setting apart land to be purchased, and it was purchased for the use of the Pawnees, Otoes, Missourias, and Poncas and Nez Percés and Tonkawas, and was finally purchased in fee and thus freed from trust limitations upon terms satisfactory to the Cherokees, by the appropriation of $8,595,736.12 (27 Stat. 640), amounting to $1.42 and a fraction per acre.

It now appears from the abstract of title given in the first part of this brief that the Choctaw Nation acquired the leased district in 1820 for full consideration paid to the United States and received by the United States as full satisfaction therefor; that by the treaty of 1830 the fee simple of such land was guaranteed to the Choctaws and by the patent of 1842 delivered in due form; that the Choctaws, by the treaty of 1855, permitted the Government to locate certain roving bands of Indians upon such lands "**on reasonable terms**," **not interfering with the rights of Choctaws or Chickasaws to settle therein,** which very feeble lease was without any other consideration than that of good neighborhood, if we allow the Choctaws and Chickasaws credit at the extremely low figure of 12½ cents an acre for the lands west of the 100th meridian, which had been ceded to them by the treaty of 1820.

Allowing this basis of 12½ cents an acre for the land west of 100° the only claim adverse to the fee-simple title guaranteed to the Choctaws and conveyed to them by patent rests solely upon the third article of the treaty of 1866.

The Government desired a part of the Choctaw land "to be set apart" "to be purchased" "for the use" "of

"such Indians," &c., as the Government desired to colonize therein. It is well known that the Government had great difficulty in colonizing the roving bands that travelled from Mexico to the line of British Columbia and which continually depredated on the frontiers of Texas and other border States. The Government tried in '55 to colonize the Wichitas and establish them permanently, and leased the right to settle them among the Choctaws and Chickasaws in the so-called leased district in this hope and expectation. The guardian of the Choctaws, the United States Government, in drawing the treaty of 1855, left no period of termination to the lease, but left it an open matter; the Choctaws relying upon the Government to do what was just in the premises by subsequent arrangement, and as they stated in the Treaty of 1855 "on reasonable terms," as the Government had usually consented to do when such matters were properly presented.

Attention is called to these facts in explanation of the true meaning of the so-called lease of the leased district for the *permanent* settlement of the Wichita and such other tribes or bands as the Government may desire to locate therein. The term permanent settlement expressed the wish of the Government and the purpose for which leased. It was leased for this purpose—a purpose uncertain of fulfilment. The Government wished and Texas wished the permanent settlement of these people, who were vexing the frontier. But it was very uncertain whether these roving bands, living in tents and loving the plain life and despising a fixed habitat, could possibly be induced to permanently settle, which was the purpose and desire of the Government, if it could be accomplished. It was not until 1872, seventeen years, that the ~~United States~~ Commissioner of Indian affairs concluded an arrangement with the Wichitas and affiliated bands of

Indians, and this agreement was never ratified. The lease for the permanent settlement, in the event the Government induced these roving bands to settle permanently, should have then been followed by some equitable arrangement with the Choctaws for the acquirement of the fee simple, and its sale to such bands at a fair value. The equities of the Choctaw Nation in its relation with the United States are manifestly not impaired in their fee-simple title in this land by that lease, further than the United States may be held to have paid them therefor.

### Annual Report of 1866.

Attention is further called to the report of the Commissioner of Indian Affairs of 1866, page 8, in which he states:

"We come now to **the series** of treaties made with "the tribes or nations resident in the Indian country, "south of Kansas. In the annual report of this office "for 1865 a very full report and statement was made of "the conferences at Fort Smith, Arkansas, resulting in a "preliminary treaty with these tribes." * * *

"**With this purpose in view,** the Cherokees, Creeks, "Seminoles, and Choctaws and Chickasaws appeared in "this city, in January, 1866, by their representatives, duly "chosen, there being double delegations in some cases, "respectively representing two parties in each nation— "those who had remained loyal to the Government and "true to their treaty stipulations, and those who had taken "part in the rebellion. These negotiations were carried "on, on the part of the Government, by the Commissioner "of Indian Affairs in connection with Col. E. S. Parker "and Superintendent Sells. Four principal points came "up for settlement, to wit: * * *

"Cession of lands by the several tribes **to be used for "the settlement** *thereon of Indians* who it is in contemplation to remove from Kansas." * * * "The next

"treaty **in this series** was made with the confederate "nations of Choctaws and Chickasaws; concluded April "20, 1866; ratification advised, with an amendment, June "28, 1866; amendment accepted July 2, 1866, and pro- "claimed July 10, 1866."

It is not only shown conclusively by the above record of these proceedings what the intentions of the parties were before the treaty was made—that is, that the land was set apart

**to be purchased**

by friendly Indians and

for the use of such Indians, &c.,

and was so understood by the Choctaws and Chickasaws, but was so understood by the Government officers immediately **after** the treaty was made, and it has been so construed continuously since, without known exception, until President Harrison's message of date February 18, 1892.

SUBSEQUENT EXECUTIVE CONSTRUCTION.

Hon. Carl Schurz, Secretary of the Interior, May 1, 1879, declares this land subject to a specific trust.

Hon. R. B. Hayes, President, February 12, 1880, declares this land "subject only to occupation by Indian tribes."

Hon. C. W. Holcomb, Acting Commissioner General Land Office, April 25, 1881, declares this land held in trust.

Hon. N. C. McFarland, Commissioner General Land Office, April 25, 1881, declares this land held in trust.

Hon. H. M. Teller, Secretary of the Interior, January 3, 1883, holds this land to be held in trust.

Hon. Samuel J. Kirkwood, Secretary of the Interior,

February 17, 1883, declares this land held in trust.

Hon. Hiram Price, Commissioner Indian Affairs, January 31, 1884, states the land to be subject "to a direct trust assumed by treaty."

Hon. H. M. Teller, Secretary of the Interior, February 14, 1884, declares this land "to be held for "Indian purposes."

Hon. Chester A. Arthur, President, July 1, 1884, declares this land "subject to Indian occupation "only."

Hon. Hiram Price, Commissioner Indian Affairs, January 26, 1885, repeats view of Secretary Schurz.

Hon. H. M. Teller, Secretary of the Interior, January 26, 1885, repeats the view of Secretary Schurz.

Nearly all of these expressions of opinions were due to attempts on the part of United States citizens to locate on such lands on the theory that they had been ceded to the United States and become public domain.

The construction of the officers charged with the duty of administering the treaty subsequently demonstrates that the treaty was understood as conveying to the United States a trust estate only.

"The construction given to a statute by those charged with "the duty of executing it ought not to be overruled without "cogent reason." (713 U.S. 571.)

All of this land except Greer county, which Texas claimed, was **immediately devoted to the settlement of Indians in accordance** with the purpose of the treaty of 1866. The Wichitas and the Affiliated Bands promptly occupied the so-called Wichita Reservation, having returned to this country in 1867. And even be-

fore the treaty of 1866 was completed the United States, in contemplation of this treaty, made a negotiation with the Kiowas and Comanches in October, 1865, above cited, and by the second article of the treaty of October 21, 1867 (15 Stats. 581), sets aside their present territory now known as the Kiowa, Comanche, and Apachee Reservations. This district was

"*set apart* for the absolute and undisturbed *use and occu-*
"*pation* of the tribes herein named, and for such other
"friendly tribes or individual Indians as from time to
"time they may be willing (with the consent of the United
"States) to admit among them; and the United States
"now solemnly agrees that no person except those herein
"authorized so to do, except such officers, agents, and
"employés of the Government as may be authorized to
"enter upon Indian reservations in discharge of duties
"enjoined by law, shall ever be permitted to pass over,
"settle upon, or reside in the Territory described in this
"article, or in such territory as may be added to this res-
"ervation for the use of said Indians," &c.

It will be observed, that this language "*set apart*" "*for* "*the use and occupancy*" of these Indians, and the stipulation that it shall *not be trespassed upon by whites*, follow with the utmost precision the pledges made to the Choctaws and Chickasaws in 1865, and which they rightfully understood to exist in the treaty of 1866, and which was so understood by the Government officers. The ratification of this agreement by the Senate of the United States shows that the legislative branch of the Government, as well as the executive branch, understood that this land was *set apart for the use of Indians only* by the Choctaw-Chickasaw treaty, and that both these branches of the Government acted strictly upon this line in dealing with the Kiowas and Comanches and Wichitas and Affiliated

Bands. It will be observed, moreover, that this treaty, article third, provides that if the tract of land set apart " contain less than **160 acres** of tillable land for each " person who at the time may be authorized to reside on " it under the provisions of this treaty, other provisions " shall be made to secure that amount of arable land."

This shows that the Commissioners of the United States and the Senate of the United States were carrying out with these people the same idea observed in the other treaties *of this series*, as in the case of the Cherokees, and which has been since carried out by the allotment of a quarter section to each of these various Western Indians who have had lands allotted to them. The purpose of this observation is to show that the officers of the United States, both Executive and Legislative, were pursuing a fixed policy with regard to these people *in the lands ceded by the Choctaws and Chickasaws* as well as in those ceded by the Cherokees, Creeks, and Seminoles. When in 1872 the unratified agreement with the Wichitas was entered into by the Commissioner of Indian Affairs to depart from the policy laid down in other cases by giving and granting to the Wichitas the land instead of setting it apart for their use, the agreement was not ratified **as it ought not to have been under the circumstances.**

Some years after the treaty of 1866 had been made, aggressive frontiersmen began to trespass upon the lands of Indian Territory upon the theory that they were open to settlement, and boomers began to organize bands of aggressive men who went into the Indian country demanding the right to homestead it on the ground that it had been ceded to the United States and that it was therefore public domain, so that this exact issue arose and had to be solved by the Executive officers of the United States. It was necessary for them to say either that this

land was land belonging to the United States and a part of the public domain or that it was not, and if it was not, to show why it was not. The following references are deemed sufficient to demonstrate the fact that the Executive Department of the United States construed that this Western land ceded by the series of treaties of 1866 was ceded in trust for the settlement of friendly Indians, to wit: Honorable Carl Schurz, Secretary of Interior, May 1, 1879, made an elaborate review of the series of treaties of 1866, and the policy of the United States from 1802. He declared that:

"The whole of this territory was included in the statute "of March 30, 1802, declaring what portion of the United "States shall be deemed Indian country, which was re- "enacted in terms by the first section of the Act of June "30, 1834. (Stats. 4, 729.)

"The intervening Act of May 28, 1830, authorized the "President of the United States to cause so much of any "territory west of the Mississippi River not included in "any State or organized Territory as he might judge to "be necessary to be set off and divided into districts for "the reception of Indian tribes. This territory was "especially selected and reserved by the Executive for the "purposes prescribed, and has ever since been known "and organized as the Indian Country, no States or "organized Territory having been created therein."

The Secretary described the history of the Cherokee title, of the Creek and Seminole lands, and states that:

"**The title acquired** by the Government by the treaties "of 1866 was secured in pursuance and furtherance of "the same purpose of Indian settlement which was the "foundation of the original scheme.

"That purpose was the removal of Indian tribes from "the limits of political States and Territory organizations "and their permanent location upon other lands sufficient

" for the needs of such tribes. These lands being ampl
" in the area for the purpose it has become a settle
" policy to locate other tribes thereon as fast as arrange
" ments can be made, and provisions have been constantl
" made by treaties, agreements, and Acts of Congress t
" effect this object.

" That purpose is expressly declared in the said trea
" ies. The cessions of the Creeks and Seminoles ar
" stated to have made ' in compliance with the desire o
" ' the United States to locate other Indians and freedme
" ' thereon.' These words may be held to create a trus
" equivalent to what would have been imposed had th
" language been ' for the purpose of locating Indian
" ' and freedmen therein.'

" The lands ceded by the Choctaws and Chickasaw
" were by Article 9 of Treaty of June 22, 1885, ' lease
" ' to the United States . . . for the permanent settlemen
" ' of the Wichitas and such other tribes or bands of In
" ' dians as the Government may desire to locate therein
" The treaty of 1866 substitutes a direct purchase for th
" lease but *did not extinguish or alter the trust.* I
" 1867 the Kiowas, Comanches and Apaches were settle
" upon these lands. In 1869 the Cheyennes and Arapa
" hoes were located by Executive order, the Wichitas be
" ing already upon a portion of the same prior to th
" purchase. . . .

" It will thus be seen that the Indian country as define
" by statute embraces the whole Indian Territory; no pa
" of it has been brought under the operation of gener
" laws or made subject to settlement as public lands.
" has attached as ' Indian Country ' for the enforcemen
" of the intercourse laws alone to the Western District
" Arkansas by Section 533 of the Revised Statutes. It
" expressly named as Indian country in the Act of Marc
" 3, 1875, ' to establish the boundaries between the Stat
" ' of Kansas and the Indian Country,' which recognize
" the proper closing of the surveys of the public land
" upon its boundaries as originally marked.

" The consolidated provisions of the Intercourse Law
" embrace two entire chapters of the Revised Statute

"Sections 2111 to 2157, inclusive. The fact that they "have not in terms re-enacted the boundaries of the In- "dian Country should not, in my judgment, be held to "destroy its previously recognized location *as the direct* "*effect of such conclusion would render inoperative the* "*entire legislation provided for its government.*" . . .
(Carl Schurz, Secretary of the Interior.)

The President of the United States on February 12, 1880, issued a proclamation sustaining this construction declaring the Indian Territory land to be "Indian Coun- "try," and as such—

"is subject to occupation only by Indian tribes, officers "of the Indian Department, military posts and such per- "sons as may be privileged to reside and trade therein "under the Intercourse Laws of the United States"—

and warns other persons that they will be removed by the United States authorities. (Issued by President R. B. Hayes, Wm. M. Evarts, Secretary of State.) The matter was further passed on by Hon. S. J. Kirkwood, Secretary of the Interior, Feb. 17, 1882, who submitted to the Senate of the United States the record compiled by the General Land Office of the United States, dated April 25, 1881, and transmitted by Hon. N. C. McFarland, Commissioner, Feb. 16, 1882.

This report of the land office recites that the entire Indian Territory is Indian country and not subject to settlement; it recites the history of the title, the treaties of 1866 with the *Choctaws*, *Chickasaws*, Seminoles, Creeks and Cherokees, and declares that:

"The lands conveyed to the United States by the fore- "going treaties *are therefore held subject to the trust* "*named*, they can be appropriated *only to the uses speci-* "*fied* and *to those uses only* by the United States, and then

"only in the manner provided by law. Miscellaneous "immigration, even by the intended beneficiaries, would "be unauthorized and illegal. The Choctaw and Chicka- "saw cession of April 28, 1866 (14 Stats. 769), was by the "tenth section thereof *made subject to the conditions of* "*the contract of June* 22, 1855 (11 Stats. 613), by the 9th "Article of which it was stipulated that the lands be ap- "propriated for the permanent settlement of such tribes "or bands of Indians as the United States might desire "to locate therein."

The Secretary of Interior transmitted to the Senate of the United States Jan. 31, 1884, the report of Hon. Hiram Price, Commissioner of Indian Affairs, quoting with approval Department letter of April 25, 1879, as follows:

"It must be further stated that no part of said territory "remains free from appropriation either *to a direct trust* "*assumed by treaty*, or by reservation for tribes thereon "under executive order, except that portion still claimed "by the State of Texas between Red River and the North "Fork of the same."

This communication, being a history of the status of the lands of the Indian Territory, is an important executive construction.

Hon. H. M. Teller, Secretary of the Interior, on February 14, 1884, in answer to a Senate Resolution of January 23, requesting advice as to the *status of lands* in the Indian Territory and whether any parts are subject to entry, states that—

"These lands were acquired by treaties with the various "Indian Nations or Tribes in that territory *in* 1866 *to be* "*held for Indian purposes*, and to some extent for the "settlement of the former slaves of some of said Indians "or portions thereof.

"*Such are the purposes for which said lands are now*

" *being used or held according to the common understand-*
" *ing of the object of the treaties* by which they were ac-
" quired, and from this arises the necessity for our obli-
" gations to keep said lands in their present condition of
" occupancy or otherwise."

Chester A. Arthur, President, Frederick A. Frelenghuysen, Secretary of State, July 1, 1884, issued a proclamation warning persons not to attempt to invade Indian Territory or settle thereon:

" Which territory is designated, recognized and de-
" scribed by the treaties and laws of the United States
" and by the Executive authorities *as Indian country*, and
" as such is *subject to Indian occupation only*."

Hon. H. M. Teller, Secretary of the Interior, January 26, 1885, in a communication to the President of the United States, acknowledging Executive reference for report of Senate Resolution making inquiry as to status of lands in the Indian Territory, quotes with approval the views of Mr. Secretary Schurz, of April 25, 1879, as follows:

" It may be further stated that *no part of said territory*
" *remains free from appropriation either to a direct trust*
" *assumed by treaty or by reservation for tribes thereon*
" *under Executive order, except that portion still claimed*
" *by the State of Texas.*" . . .

" *This status of the land* as thus determined has been
" adhered to by this Department, and on April 26, 1879,
" February 12, 1880, and July, 1884, proclamations were
" issued by the President warning unauthorized persons
" against going upon these lands. . . .

" Until the existing status of the lands shall have been
" changed *by agreement with the Indians interested*, or in
" such other manner as may be determined upon by Con-
" gress, the integrity of the treaties heretofore made with

" the Indians should be maintained, and the power of the " Government, to the extent necessary, should be exer- " cised to keep intruders and all unauthorized persons off " the lands."

Chester A. Arthur, President, January 27, 1885. The President approves the views of the Secretary of the Interior and states that—

" ' Until the existing status of these lands shall have " ' been changed by agreement with the Indians interested, " ' or in such other manner as may be determined upon by " ' Congress, the treaties heretofore made with the Indians " ' should be maintained, and the power of the Government " ' to the extent necessary should be exercised to keep off " ' intruders and all unauthorized persons.' "

Honorable Hiram Price, Commissioner of Indian Affairs, in a communication to the Secretary of the Interior January 26, 1885, quotes with approval the various findings of the Department and says:

After referring in detail to the several actions of Congress under which the Indian Territory was created and defined as Indian country, also the several early treaties with the Cherokees, Creeks, Choctaws, and Chickasaws and Seminoles, the Honorable Commissioner says:

" By this treaty title was guaranteed to the several " tribes, and it was provided that the lands should never " be included within the territorial limits or jurisdiction " of any state or territory, but should remain subject to " the intercourse laws, which laws have, as heretofore " stated, continued in force in all parts of the Territory " until the present time.

" The title acquired by the Government by the treaties " of 1866 was acquired in pursuance and furtherance of " the same purpose of Indian settlement which was the " *founding of the original scheme.*

"*That purpose was the removal* of Indian tribes from "the limits of the political state and territorial organiza- "tions and *their permanent location upon other lands* "*sufficient for the needs of such tribes.*

"These lands being ample in area for the purpose, it "has become *a settled policy* to locate all the tribes "therein as fast as arrangements can be made, and pro- "visions have been constantly made by treaty, agree- "ments, and acts of Congress to effect these objects . . ."

On the authority of the legislative constructions upon all the treaties of 1866 above quoted and set forth, the Congress of the United States not only resisted for many years the attempt on the part of interested persons to pass legislation throwing the lands west of the home tract of the Five Civilized Tribes open to settlement for the reasons which have been set forth in the various reports made to Congress in answer to Senate resolutions above cited, but Congress did, by the language used in the Kiowa-Comanche treaty, and Apache treaty, immediately after the treaty of 1866, show that Congress understood at that time the meaning of the Choctaw-Chickasaw treaty in relation to the lands of the leased district, and Congress has, in its construction of the meaning of these cessions made by the series of treaties of 1866, acknowledged in the most elaborate manner in dealing with the Creeks, the Seminoles, the Cherokees, the Choctaws, and Chickasaws and construed the treaties to mean that the lands ceded to the Government by the treaty of 1866 *were ceded in trust.* The Creeks were paid by Congress under agreement of January 19, 1889, for the lands ceded in 1866 (25 Stats. 757), March 1, 1889; the Seminoles were paid for their western lands ceded to the Government in 1866 by act of March 2, 1889 (25 Stats. 1005), and the Cherokees were paid for their lands west of the 96th meridian the value thereof by act

of Congress, $8,595,736.12 (27 Stats. 640), and the Choctaws and Chickasaws were paid for a portion of the leased district by act of Congress of March 3, 1891, the sum of $2,999,450.00 (26 Stats. 1025).

When the Cheyenne and Arapahoe reservation was thrown open to settlement, this act of Congress recites that—

"Said lands having been *ceded in trust by Article 3 of* "*the treaty* between the United States and said Choctaw "and Chickasaw nations of Indians which was concluded "April 28, 1866."

Hon. George Chandler, Acting Secretary of Interior, on September 16, 1890, transmitted to the Chairman of the Committee on Indian Affairs of the House of Representatives a report of the Indian Office on a memorial of the Choctaws and Chickasaws asking compensation for the leased district. This report of the Commissioner of Indian Affairs, September 13, 1890, recites elaborately the history of the treaties and analyzes the series of treaties in a report of a forcible character referring to the record which has been above set forth, and says, referring to the treaties of 1866, that—

"It shows quite clearly that the Indians understood "that they were parting with whatever right, title or "interest remained to them in the Leased District to the "United States *to be used for the location and settlement* "*of other Indians thereon.* The stipulations made about "that time by the United States with Indian Tribes "shows very conclusively that a policy had been care-"fully mapped out for the acquisition by the United "States of the right *to locate other Indians* upon portions "of the lands owned and occupied by the Five Civilized "Tribes in the Indian Territory.

"I am inclined, therefore, to the opinion that the

"Choctaw and Chickasaw Indians have good grounds "for their claim that the United States took the lands "*ceded by them upon the trust to settle other Indians and* "freedmen thereon, as the policy upon which the "negotiations were made clearly indicate its desire and "purpose to do.

"*Admitting*, however, *the fact of a trust as the basis of* "*their claim*, I do not think that they have any ground "upon which to demand payment for further compensa- "tion for the release and discharge of said lands from the "alleged trust *so long as the purposes of said alleged trust* "*are observed* and adhered to, that is, so long as the lands "are occupied by Indians placed upon them by the "United States. The Indians placed upon said lands as "heretofore shown are still occupying them. No negotia- "tions have been concluded with any of said occupying "tribes for relinquishment of their right, title, and interest "in and to said lands or any portion of them, nor has "the United States appropriated any of said lands to "any other use nor authorized the appropriation of any "portion of them *to any other use;* in view of this fact "it would seem that the basis of claim of the Choctaws "and Chickasaws for further compensation for the lands, "if valid, the claim itself is *prematurely* presented. [The "Commissioner overlooks the important fact that these "lands were 'to be set apart **to be purchased** for the "'use,' &c.] It is presumed, however, since the fact that "negotiations have been authorized, and under the "authority of law have been and are being pursued for "cessions 'by the Indians owning or claiming lands lying "'west of the 96th degree of longitude in the Indian "'Territory, . . . of all their title, claim or interest of "'every kind or character in and to said lands' (25 Stats. "1005) has prompted the Choctaws and Chickasaws to "bring forward this claim.

"So far as this office is aware, nothing is contained in "the instructions given to the Commission appointed to "make these negotiations which would authorize or war- "rant it in negotiating with the Choctaws and Chicka- "saws covering this claim, and this may account for its "direct presentation to Congress." . . .

"While there are clearly no words of limitation in the "treaty of 1866 as to the uses to which the ceded lands "should be put by the United States, the history of the "negotiation preceding and resulting in that treaty and "the subsequent treatment of that treaty quite clearly in- "dicate that the Choctaws and Chickasaws have quite "clear ground for claiming that the lands were to be used "for the location of other Indians and freedmen thereon. "If they have, *as seems to be the case, an equitable claim "it is for Congress to determine* what shall be the measure "of allowance to be made for its adjustment in order to "clear the land of the incumbrance.

"If anything is to be allowed, the settlement made with "the Creeks and Seminoles in 1889 of similar claims may "assist in reaching a conclusion in this case."

The Choctaws have the same understanding of the treaty as shown by their numerous records. Attention is particularly called to act No. 15, approved December 24, 1889, Choctaw Laws, wherein occurs the following language:

"Whereas * the Choctaws and Chickasaws did, by "the third article of the treaty of 1866, cede the land "west of the 98th degree of west longitude to the United "States, **in trust** for the purposes aforesaid (for the use "of friendly Indians), and under the conditions of the "existing laws and treaties of the United States herein- "before mentioned;

"And whereas, by act of Congress of March 1, 1889, "the United States departed from the long established "policy of holding the lands of the Indian Territory for "Indian settlement by purchase of the lands of the Creeks "and Seminoles **which had been sold to the United "States for the same purposes as in the case of the "Choctaw cession of the lands west of the 98th "degree** of west longitude; and whereas the United "States, by act of Congress of March 2, 1889, in pursu- "ance of this new line of policy, authorized the President

" of the United States to appoint commissioners to nego-
" tiate with all Indians owning or claiming lands lying
" west of the 96th degree of west longitude in the Indian
" Territory for the cession to the United States of all their
" title, claim, or interest of every kind or character in and
" to said lands;

"And whereas the Choctaw people recognize the
" changes which have taken place in the policy of the
" United States, and the desire of the Government to
" establish a territorial government in the western part of
" the Indian Territory, and the need to use the lands west
" of the 98th degree of west longitude for a different pur-
" pose **than the holding in trust for friendly Indians**
" **as by the cession of 1866;**

"And whereas the Choctaws have ever been willing and
" anxious to conform to the wishes of the United States
" consistently with the interest of their own people: Now,
" therefore,

"Section 1. Be it enacted by the General Council of
" the Choctaw Nation assembled, That the Principal Chief
" of the Choctaw Nation is hereby authorized and directed
" to appoint by and with the advice and consent of the
" Senate three competent sober men who shall constitute
" a delegation with full authority to represent the Choc-
" taw Nation in reference to the rights of the nation in the
" lands lying between 98th and 100th degrees of west lon-
" gitude," etc.

This delegation was authorized to negotiate with the United States for the relinquishment to the United States of their interests in the leased district.

## The Term "Cede."

The term used by the treaty is "cede," the word "convey" is omitted, and the manifest meaning of this word is to relinquish the jurisdiction and unrestricted right of settlement which the Choctaws and Chickasaws had up

to this time retained. This was a proper term to use for the purpose of carrying into effect the proposition or stipulation 5 by which it was proposed to set apart a part of the Choctaw country for the use of such Indians as the Government wished to colonize therein. It was not the term proper to be used in conveying a fee simple, patented title. Governments cede jurisdiction, but fee simples are not *ceded* but sold and conveyed for adequate considerations. The Government practically had assumed, and the Choctaws recognized their sovereignty from a very early period, to wit, January 3, 1786 (7 Stats. 21, art. 2), wherein the Government acknowledged the Choctaws "to " be under the protection of the United States of Amer- " ica, and of no other sovereign whatsoever." And the Government further has exercised, and the Indians have relied on, a supervisory guardianship, wherein the Government has taken charge of their landed interests, as of the Mississippi lands of the Choctaws, handled the property as a guardian and accounted to the Choctaw Nation as a ward. [Witness the Net Proceeds case.] It was perfectly proper for the Choctaws to cede this land to the United States as trustee and for the accommodation of the United States, which was exercising guardianship over other western Indians, whose permanent settlement was important, but the Choctaws only ceded, they did not sell and convey for adequate consideration. That the sovereign and guardian could acquire the absolute fee of 4 cents an acre from the ward in a treaty made on the basis of proposition 5 or stipulation 5, and which basis was well understood by both parties to be a trust conveyance, simply because of the failure of a draftsman to insert the terms of limitation agreed on is inconceivable. The sovereign is incapable of permitting such a construction, much less of seeking it.

The term "cede" used in the third article of the treaty of 1866 is a term usually applied to the act by which one State or nation transfers territory to another for jurisdictional purposes, and does not ordinarily convey the title of land itself; usually the titles held by persons within the ceded territory are expressly provided for and understood not to be disturbed. The Choctaws had exercised jurisdiction over this country until 1866, and the word "cede" certainly extinguished the right of further exercise of authority over this territory. It did not necessarily interfere with the equitable interest of the Choctaw people in the land. The term "cede" is not the language by which a fee-simple deed is conveyed. This land was conveyed in fee simple to the Choctaws, so that each Choctaw and Chickasaw *citizen had an equal undivided interest* in the property.

The method by which the actual fee simple to land sold by the Choctaws and Chickasaws, Seminoles and Creeks under the treaties of 1866 should be conveyed, has been clearly and forcibly shown both by the Congress of the United States and by the President of the United States in the acts of Congress requiring solemn deeds of conveyance, duly authorized and executed with great formality, expressly conveying the full and complete title to the United States. This was the method in the case of a portion of the Leased District formerly occupied by the Cheyennes and Arapahoes by deed of June, 1893. This was the method in the case of the Seminole western lands in which deeds of conveyance of full title were required by the President of the United States and executed in March, 1889. The form prescribed by the executive officers of the United States as necessary and requisite to a transfer of the full title is an important executive construction. In the sale of real estate the contract for the

purchase and sale requires a concurrence of will on the part of both vendor and purchaser.

Irwin *v.* Bank of Kentucky, 5 L. A. N. 1.
4 Wheat. 228.
15 L. A. N. 521.
123 Mass. 356.
4 Am. Rep. 560.

Certainly no one can believe, in the face of the negotiations and reports of the officers of the United States as to their meaning and the methods of negotiation, that the United States *intended* by the use of the word *cede* in the third article of the treaty of 1866 to require the conveyance of the full title to this enormous estate, and much less can it be believed that the Choctaws and Chickasaws had such intent. Without such intent the estate did not pass.

The parties must be capable of contracting, and if between a guardian and ward, the transaction must be for a fair consideration, and the instrument should be so drawn as to convey the title in terms that shall be free from doubt. The Government itself has used the word "cede" in conveying lands to the Choctaws and Chickasaws when it was not intended to convey the fee simple, and it has used a very different nomenclature when it intended to convey the fee simple or complete title or when it intended to receive it. This will be observed in relation not only to the Choctaws and Chickasaws, but also in relation to the other Five Civilized Tribes.

This term "cede" was used by the Choctaws in 1820 and 1830, as to lands in which the fee was not in them. When the fee was intended to be conveyed the United States used very different language, to wit: "under a grant spe-
" cially to be made by the President of the United States

" shall cause to be conveyed to the Choctaw Nation a tract " of country west of the Mississippi river *in fee simple to* " *them and their descendants.*" (7 Stats. 33, Art. 2.)

The United States in 1820 (7 Stats. 211, Art. 2) *ceded* the Choctaws the lands west, but did not convey the fee. In the treaty of 1830, Art. 14 (7 Stats. 335), an Indian who wished to remain in Mississippi was allowed to do so and acquire not a *cession* but "a grant in fee simple." The treaty of 1830 expressly laid down the principle, Art. 18 (7 Stats. 336), that "in the construction of this treaty, " wherever well founded doubt shall arise it shall be con- " strued *most favorably to the Choctaws.*"

The United States did not understand the word *cede* to convey title to the Creek and Seminole land, and by Sec. 8 of Ind. Appro. Act of March 3, **1885,** authorized the President to negotiate with Creeks, Seminoles and Cherokees for the purpose of opening to settlement under the homestead laws the *unassigned* lands in Indian Territory ceded by them, respectively, to the United States, by the several treaties of August 11, 1866, March 21, 1866, and July 19, 1866.

The Choctaws and Chickasaws were omitted because they had no unassigned land available for opening, Greer County being then in dispute, and not because they had *ceded* a greater title to the United States.

The Creeks *ceded* and *conveyed* "to be *sold* to and " used as homes for civilized Indians," and some of this very land was immediately *sold* (not *ceded*) to the Seminoles (Treaty of 1866), and later to the Sac and Fox Indians (15 Stats. 495), Feb. 18, 1867, and to the Pawnees April 10, 1876 (19 Stats. 29), but before the *full* fee was actually acquired by the United States, Congress passed an Act (25 Stats. 757), March 1, 1889, confirming an agreement by the terms of which the Muscogee (or Creek)

Nation "absolutely cedes and grants to the United States, " without reservation or condition, *full and complete title* " *to*" the western lands in question *ceded in* 1866, and the National Council of the Creek (or Muscogee) Nation was required to pass an act confirming and ratifying the grant of title.

The Seminoles *ceded* their lands likewise under the treaty of 1866, but the term "*cede*" was not deemed sufficient to convey full title, and Congress passed an act paying them $1,912,942.02 in full "for all the *right, title, in-* " *terest*, and *claim* which said Indians may have in and to " certain lands *ceded by article three* of the treaty of " 1866."

"This appropriation to become operative upon the execu- " tion by the duly appointed delegates of said Nation, " specially empowered so to do, of a release and convey- " ance to the United States of all the right, title, interest " and claim of said Nation of Indians in and to said lands, " *in manner and form satisfactory to the President of the* " *United States*, and said release and conveyance, when " fully executed and delivered, shall operate to extinguish " all claims of every kind and character of said Seminole " Nation of Indians in and to the tract of country to which " said *release* and *conveyance* shall apply."

The President of the United States caused to be drawn a deed which the Seminoles executed for the purpose of conveying to the United States the full fee, using the following language:

"Do by these presents *give, grant, and convey* to the " United States of America the lands hereinabove men- " tioned and described and do hereby *release, surrender,* " *transfer and set over* to the United States of America " all the right, title, interest and claim of said Seminole " tribe or nation of Indians existing at law, in equity or

" otherwise." * * * " With all rights, privileges and " appurtenances thereunto belonging or in any manner " appertaining," etc.

(Record of treaties, vol. 3, p. 38.)

In the case of the title to the Cherokee lands west of 96th meridian, on which by the Treaty of 1866 the United States acquired the right to settle friendly Indians, Congress on March 3rd, 1893, passed an Act (27 Stats. 640) authorizing the Secretary of the Interior to contract to pay **$8,300,000.00** in addition to $295,736.00 in cash " to pay the Cherokee Nation of Indians for all the *right*, " *title, interest, and claims* which the said Nation of Indians " may have in and to certain lands described and speci- " fied," &c., between 96th and 100th degrees of West Longitude and the acceptance by the Cherokee Nation of any part of the money should operate " as a full and " complete *relinquishment and extinguishment* of all their " title, claim, and interest in and to said land."

The Act of Congress of June 5, 1872 (17 Stats. 228) recites that " by the Treaty of 1866 between the United " States and the Cherokee Nation of Indians, said Nation " *ceded to the United States* all its lands west of the 96th " meridian west longitude, for the settlement of friendly " Indians thereon " (and this construction of this Treaty was maintained by the Executive Department and Cherokee settlement forbidden, see Jas. Bell case *et cet.*)

The Osages were assigned their present country by this act and it was provided therein, " That said Great " and Little Osage tribe of Indians shall permit the set- " tlement within the limits of said tract of land the Kan- " sas Tribe of Indians, the lands so settled and occupied " by said Kansas Indians, not exceeding one hundred " and sixty acres for each member of said tribe," &c. The Cherokees received $1,099,137.41 from the Osage

Funds in payment for these lands and *deeded the land* to the United States by deed of June 14, 1893, in trust for the Osage Indians.

By Act of March 3, 1883 (22 Stats. 624), it was provided that the Cherokee Nation, through its proper authorities, shall execute *conveyances, satisfactory to the Secretary of the Interior,* to the United States *in trust only* for the benefit of the Pawnees, Poncas, Nez Perces, Otoes and Missourias and Osages who were occupying portions of the Cherokee Western lands, the Cherokees having been paid for these *trust* conveyances.

The Cherokees were required to sign these deeds, using the following language:

"Does by these presents *grant, bargain, sell, remise,* " *release, relinquish,* and *confirm,* etc., with *all* and *singu-* " *lar* the *hereditaments* and *appurtenances,*' etc.

This language is used in every one of the five Cherokee deeds to the United States in trust for the Pawnees, Poncas, Nez Perces, Otoes and Missourias and Osages.

When the Seminoles and Creeks agreed on a transfer of title from the Creeks to the Seminoles they were not content with the use of the word *cede,* but, August 7, 1856 (11 Stats. 699), in article 1 the Creek Nation doth "*grant,* " cede and *convey* to the Seminole Indians the tract of coun- " try," &c., and by article 3 of same treaty, "The United " States do hereby solemnly guarantee to the Seminole " Indians the tract of country" conveyed to them "*by* " *the same title and tenure by which they were guaranteed* " *and secured to the Creek Nation by the fourteenth article* " *of the Treaty of March* 24, 1832, *the* 3*rd Article of the* " *treaty of February* 14*th*, 1833, *and by the letters patent* " *issued to the Creek Nation on the* 11*th day of August,* " 1852, *and recorded in Volume four of Records of In-*

"*dian Deeds in the office of Indian Affairs, pages* 446 *and*
"447."

Even in the case of the Choctaws and Chickasaws when they executed a deed to the United States for that portion of the leased district formerly occupied by the Cheyennes and Arapahoes, the President of the United States was not satisfied with the term "cede," but this deed of conveyance (see record of treaties, vol. 3, p. 69 to 80, inclusive), uses the language:

"*Give, grant, bargain, sell, release, convey, surrender,*
"and *set over*" * * * "*all the right, title, interest,* and
"claim of the said Choctaw Nation of Indians *existing at*
"*law,* in *equity,* or *otherwise.*"

To this deed was attached the following:

"The manner and form of this release and conveyance
"are satisfactory to me. May 23, 1893.
"GROVER CLEVELAND,
"*President of the United States.*"

The United States required from the Chickasaw Nation a deed for their interest in this property (see page 80 to 90, vol. 3, record of treaties) in which the following language is used: Chickasaw

"*Give, grant, bargain, sell, release, convey, surrender,*
"*transfer,* and *set over* to the United States of America
"*all the lands* and *all the right, title, interest,* and *claim*
"of the said ~~Choctaw~~ Nation of Indians *existing at law,*
"*in equity,* or otherwise," etc.

And to this deed was attached the following certificate:

"The manner and form of this release and conveyance
"are satisfactory to me. May 23, 1893.
"GROVER CLEVELAND,
"*President of the United States.*"

It will thus be seen that in no case did the United States use the word "cede" in dealing with these Indians or any of them as the equivalent of conveyance of the full title, but that in every instance, where it was intended that the entire fee should be conveyed, the suitable and proper terms were used in every instance to express with precision what was intended.

## Congressional Construction.

The Indian Committees of Congress substantially confirmed the view expressed by the Indian Office and submitted by the Secretary of the Interior in the report of September 22, 1890, which states in reference to the propositions or stipulations on which the treaties of 1866 were based as laid down by the Commission of the United States at Ft. Smith, in September, 1865, that "*upon this basis* the "different treaties of 1866 were made with the Cherokees, "Creeks, Seminoles, Choctaws, and Chickasaws, in which "treaties each of the Five Tribes or nations ceded to the "Government a large portion of their common country."

The Indian Committee of the Senate of the United States made a similar finding, and it resulted in the Act appropropriating to the Choctaws and Chickasaws payment for the Cheyenne and Arapahoe reservation. (26 Stats. 1025.) This Act of Congress required formal deeds to be made by the Choctaws and Chickasaws *in manner and form satisfactory to the President.*

In Congress the matter was debated at great length.

For the first time in the history of the country the fact that the Leased District was ceded to the United States in trust was challenged by the President of the United States in a message of February 18, 1892.

The preparation of this message for the signature of

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the President not only did the Choctaws enormous injustice, but grossly misled the President himself. The reasons suggested in the message of the President justifying the postponement of the execution of the laws were first: that the Choctaw Nation had agreed to pay their delegates and attorneys too much money; second, that one of the Choctaw delegates had presented the President an affidavit that the Choctaw Council had been corrupt; third, that the Choctaw Nation had proposed to exclude certain citizens from participation in the proposed distribution of the money appropriated by Congress; fourth, that the Chickasaws had steadfastly refused to admit freedmen to citizenship as they stipulated to do in the treaty of 1866. These four arguments were abundantly answered by the Choctaws and Chickasaws and shown to be based upon misinformation and erroneous suggestions, but certainly these four reasons cannot possibly affect the question as to whether or not the lands of the Leased District were or were not ceded in trust.

The point of importance in the opinion of the President is that he did not think the lands were ceded in trust. His reasons set forth are as follows: First. He thought the treaty contained no express limitation upon the uses to which the United States might put the territory known as the Leased District. That the lands were ceded in terms sufficiently comprehensive to have passed the full title of the Indians. Second. The stipulation to exclude white settlers might have referred solely to the National lands east of 98. The President says that: "If on adequate consideration by treaty "the United States placed upon these lands other Indian "Tribes it was competent to give them patent in full for "a certain agreed reservation. This being so, when the

" policy of allotment is put in force the compensation for " the unused lands should certainly go to the occupying " tribes, which in the case supposed had paid a fair con- " sideration for the whole reservation." The error of the President was that the premises were false. These lands were ceded to the United States and thus set apart " TO " BE PURCHASED " for the use of other Indians on terms to be agreed on by and between such Indians and the Choctaws and Chickasaws, or on such terms as the Government as sovereign over the tribe vendor and the tribe vendee should fix. It is not true that the United States was competent to give patents in fee to any other Indians without paying the Choctaws and Chickasaws for their equitable interest, neither was it true that the occupying tribes had paid a fair consideration for the whole reservation. They had paid nothing in fact to the Trustee of the Choctaws and Chickasaws.

The President says: "It will hardly be contended " that in such case the Government should pay " twice for the lands." The fact is, the Choctaws and Chickasaws are soliciting the Government to pay *once for the lands, and once only.* Whatever the Government owes the Wichitas was not due to the title to the Leased District; whatever the Government owes the Cheyennes and Arapahoes was due to other relinquishments by the Cheyennes and Arapahoes and not to any part of the title to the Leased District; whatever the Government owes the Kiowas, Comanches, the Apaches, was due to other sources than any part of the title to the Leased District, because the Government got no part of the Leased District from any of these Indians, but from the Choctaws and Chickasaws alone.

The President makes a point that the Choctaws and Chickasaws do not claim payment for the lands allotted

to the Cheyennes and Arapahoes. That is exactly what they do claim. Although Congress did not provide for pay for lands actually allotted the Cheyennes and Arapahoes, this was not the fault of the Choctaws, as they were entitled to such compensation. And the fact that they were denied a part of their right, such denial being in itself unjust, constitutes no just argument to deny them their whole right.

These are the only arguments offered by the President except his suggestion made to Congress that a failure to repeal the appropriation to the Choctaws and Chickasaws for the Cheyenne and Arapahoe reservation "would involve very large future appropriations." This question of economy suggested by the President manifestly does not affect the merit of the controversy, and this aspect was properly considered in Congress by the House of Representatives and by the Senate of the United States upon the full record and all the facts. (Senate Report 552, 52d Cong., first session.) The Senate passed the following resolution:

"*Resolved*, That for reasons set forth in the Report of "the Committee on Indian Affairs upon the President's "message of February 18, 1892, upon the appropriation "of March 3, 1891, for payment to the Choctaw and "Chickasaw Nations for their interest in the Cheyenne "and Arapahoe reservations in the Indian Territory sub-"mitted with this resolution it is the opinion of the "Senate that *there is no sufficient reason for interfering* "*in the due execution of the law referred to.*"

On June 17, 1892, the Committee on Indian Affairs of the House of Representatives submitted a full report on the same subject and recommended the adoption of the following resolution of the House of Representatives:

"*Resolved*, That for reasons set forth in the Report of " the Committee on Indian Affairs upon the President's " message of February 17, 1892, upon the appropriation " of March 3, 1891, for payment of the Choctaw and " Chickasaw Nations for their interest in the Cheyenne " and Arapahoe reservations submitted with this resolu- " tion, it is the opinion of the House of Representatives " that *there is no sufficient reason for interference in the* " *due execution of the law referred to.*" (H. R. Rep. 1861, 52d Cong., 1st Sess.)

The reasons set forth in the Reports of the Committees of Indian Affairs of the House of Representatives and of the United States Senate, which were thus endorsed by Congress in both branches, are substantially those set forth in this argument—that is, that the Leased District was held by the United States in trust only, and that the Choctaws and Chickasaws owned the equitable title to such estate.

This resolution having duly passed both the Senate and the House of Representatives, Congress declined to interfere further than to correct a palpable error in the estimate on which the appropriation of March 3, 1891, was based, to wit, 244 Cheyenne allotments from a record previous by the Cheyenne Indian Agent were deducted at 160 acres each at $1.25 an acre, amounting to $200 each, equalling a total of $48,800. This amount, by a joint resolution of Congress, was deducted from the appropriation of March 3, 1891. It will therefore be seen that the appropriatian made to the Choctaws and Chickasaws on account of the Leased District after the fullest debate in the House of Representatives, after the fullest debate in the Senate of the United States in the Fifty-first Congress and in the Fifty-second Congress (and on the second vote of the United States Senate there were only thirteen negative votes), the right of the Choctaws and

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Chickasaws to compensation for their equitable interest in the lands of the Leased District has been construed in the most forcible manner by the highest legislative authority of the Government of the United States.

## Historical Conditions.

Any other construction of the third article of the treaty of 1866 is contradicted by the historical conditions.

The question arises: For what purpose did the United States need to acquire the lands of the Leased District? Did the Government require this western land for the settlement of her own citizens under the homestead laws?

It is well known as an historical fact that the Government had untold millions of acres available for the frontier settlers at this time. The Western States were sparsely settled. The Government did not need this land for such purpose, nor did the United States pass any act authorizing it to be used for any such purpose, but Congress kept it under the supervision and within the control of the statutes governing Indian country. The settlers had all the Western States, but the Indians seemed to require a district free from white intrusion.

Did the Government need this land for the settlement of other Indians at this time? And if so, why? The Government did need this land at this time for the settlement of the Kiowas, Comanches and Apaches, the Wichitas and Affiliated Bands, and immediately thereafter put these Indians on this land; the Wichitas by Executive order, and the Kiowas, Comanches and Apaches by a treaty which uses the very language which had been presented to the Choctaws and Chickasaws in the seventh proposition of the Council at Ft. Smith, in September of '65.

Consent of the Commissioner of Indian Affairs

By the Kiowa-Comanche treaty this very identical land was "*set apart*" for the "*use*" of these Indians, with a stipulation that *white persons should not be allowed to intrude thereon.* What stronger evidence could the Government have given that this land was set apart for the use of other Indians than to immediately devote the land itself for this identical purpose? Actions speak louder than words, and in this instance both the actions of the Government and the words of the Government unite to strongly support the position taken by the Choctaws and Chickasaws, that they ceded this land to the Government to be set apart for the use of such Indians as the Government might desire to colonize thereon.

## No Confiscation Intended.

The construction that the United States acquired the full title to the Leased District by the Third Article of the Treaty of 1866 is impossible for the following reasons: That it would have amounted to confiscation; every dollar of the consideration, three hundred thousand, named in the Third Article of the Treaty of 1866 by its terms would have gone to the freedmen if the United States had removed the freedmen as agreed by this Article; in other words, in this contingency not one dollar of the consideration would have been received by the Choctaws and Chickasaws, there being exceeding three thousand freedmen at that time; in other words, the United States would have acquired the absolute title to 7,713,000 acres of land without the payment of a dollar. This would have been confiscation.

It has been suggested that perhaps the United States intended to punish these Indians for being in rebellion and to confiscate their property west of the 98th meridian.

Such a theory is contradicted by the express declarations of the Commissioners in dealing with these Indians. It is true that on the 5th of July, 1862 (12 Stats. 528), Congress inserted a provision in the Indian Appropriation Act, "that in cases where the tribal organizations of any "Indian tribe shall be in actual hostilities to the United "States the President is hereby *authorized* by proclama- "tion to declare all treaties with tribes to be abrogated "with such tribes IF, in his opinion, the same can be done "consistently with good faith and legal and national obli- "gation," but it is also true that the President did not by proclamation or otherwise abrogate the treaties with the Choctaws and Chickasaws nor with any of the Five Civilized Tribes.

The record of this entire transaction demonstrates that there was no intention on the part of the Commissioners negotiating this treaty to confiscate the property. In the formal address of the United States Commission at Fort Smith made by the President of the Commission, after the blessing of the Great Spirit over their deliberations had been devoutly invoked, he uses the following language:

"Brothers, it is proper that thanks should be returned "to the Great Spirit, the Creator of us all, that our lives "have been preserved to meet each other upon this occa- "sion. . . . Your Great Father, the President . . . has "sent the Commissioners now before you to hear and "consider any matter which you may desire to lay before "us, and to make treaties of peace and amity with all his "red children who may desire his favor and protec- "tion. . . .

"Under the terms of the treaty with the United States "and the law of Congress of July 5, 1862, all these "Nations and Tribes forfeited and lost all their rights "and annuities and lands; the President, however, *does* "*not desire to take advantage of or to enforce the penal-*

" *ties for the unwise action of these Nations* (Rep. 1865,
" 298). The President is *anxious to renew the relations*
" *which existed at the breaking out of the rebellion. . . .*"

Answering the Cherokees (p. 299), President Cooley read the following: " The Commission in response to the state-
" ment yesterday in behalf of the Cherokees says: The
" Cherokee Nation are at fault in interpreting what was
" said by us on Saturday as to 'forfeiture of land,' &c.,
" as a *fact accomplished*, but the Commissioners said 'all
" 'such as have made treaties,' &c., have 'rightfully for-
" 'feited,' &c., 'under the laws of Congress 1862, *which*
" '*authorized the complete forfeiture*, BUT the *President does*
" '*not desire to enforce the penalties* for the unwise action
" 'of these nations.' . . .

"And we assure you in behalf of the President, that if
" you desire to treat with the United States and *wipe out*
" *the stigma* and disability which bad men have fastened
" upon you, *the forfeitures and penalties provided by the*
" *act of Congress of July*, 1862, *will not be applied to or*
" *made operative against those who have not voluntarily*
" *aided the enemies of the Government even if found neces-*
" *sary in other cases;*" and in the articles of agreement, drawn up on the 10th of September, 1865, of the treaty of peace and amity which was required to be signed by all of the Indians, the treaty recites that whereas by entering into

" Treaty negotiations with said so-called Confederate
" States, whereby they have made themselves liable to a
" forfeiture of all rights of every kind, character, and de-
" scription, . . . and whereas it is the desire of the
" Government *to act with magnanimity* with all parties
" deserving clemency and to re-establish order and legiti-
" mate authority among the Indian tribes after providing
" that the tribes subscribing to the agreement acknowledge

"themselves under the protection of the United States,
"repudiating all other treaties and *recognizing their trea-*
"*ties with the Government in full force*,"

the treaty provides:

"In consideration of the foregoing stipulations made by
"the members of the respective nations and tribes of In-
"dians present, the United States, through its Commis-
"sioners, promises that it will re-establish peace and
"friendship with all the nations and tribes of Indians
"within the limits of the so-called Indian country; that
"it will afford ample protection *for the security of the*
"*persons and property of the respective nations or tribes.*"

The Choctaw and Chickasaw Commissioners (p. 310) replied that they were ready to sign the agreement and

"We recognize the Government of the United States
"as having maintained its supremacy and as offering to
"resume by treaty its *former relations with us as Nations.*
"We are ready and willing to resume such relations and
"sign the treaty of peace and amity in all sincerity, claim-
"ing no rights but those properly belonging to us."
R. M. Jones, President of the Choctaw Commission.
J. H. Kingsbury, Assistant Secretary.
David Berney, President *pro tem* Chickasaw Commission.
G. D. Jones, Secretary.

The treaty itself with the Choctaws and Chickasaws (14 Stats. 769) pledges the peace and friendship of the United States, and in—

Article 10 "reaffirms all obligations arising out of treaty
"stipulations or acts of legislation with regard to the
"Choctaw and Chickasaw Nations entered into prior to
"the late rebellion and in force at that time not incon-
"sistent herewith," and in—

Article 45 "all the rights, privileges, and immunities

" heretofore possessed by said nations or individuals " thereof or to which they were entitled under the " treaties and legislation heretofore made and had in " connection with them shall be and are hereby declared " to be in full force so far as they are consistent with the " provisions of this treaty." There is nothing in the treaty of 1866 inconsistent with the idea that the leased district was ceded to the United States in trust " to be " purchased " for the settlement of friendly Indians and that such land was to be held by the United States for Indian purposes only. Such land, therefore, is subject to the previous declarations of treaty which declared that no part of the land conveyed to the Choctaws and Chickasaws should be embraced within the limits of a State or Territory and that such lands should be free from white settlement. It was not the policy of the United States to pass acts of confiscation against her Indian wards who had been coerced into making treaties with the Confederacy. The plea of these Indians to excuse their fault was that the United States having agreed to protect them from domestic strife and against intestine war withdrew its military posts from Fort Smith, Fort Gibson, Fort Arbuckle, Fort Washita, the Indians were threatened with invasion from Texas, received hostile communications from the authorities of Arkansas, were subject to the danger of immediate annihilation and were compelled under the duress of military force to enter into an alliance with the Confederate States; that it was not optional with them; that they were not permitted to be neutral and that their act should be treated with clemency because of these facts. This view was understood by the United States, and not only were the Indians not subjected to confiscation laws but even the white people who had made war on the Government and coerced these Indians were not subjected to confiscation laws.

The Indians themselves were not permitted to enforce confiscation laws against their own people (14 Stats. 799). Article 3 of the Cherokee treaty reads as follows, showing the policy of the Government at this time: "The "confiscation laws of the Cherokee Nation shall be re- "pealed and the same, and all sales of farms and im- "provements on real estate made or pretended to be "made in pursuance thereof, are hereby agreed and de- "clared to be null and void, and the former owner of "such property so sold, their heirs or assigns, shall have "the right peaceably to reoccupy their homes, and the "purchaser under the confiscation laws, or his heirs or "assigns, shall be repaid by the treasurer of the Cherokee "Nation from the national funds, the money paid for "said property and the cost of permanent improvements "on such real estate, made thereon since the confiscation "sale."

The amount of the land in the leased district outside of Greer county was slightly in excess of 6,000,000 acres. The Choctaws and Chickasaws having been paid $[illegible]00,000.00 in 1855, on such leased district the further allowance of $300,000.00 in 1866, they adopting their freedmen as the Creeks and Seminoles did, would have made about 12 cents an acre for this land, which was *about the same as the Seminoles received* for their land, so that the Choctaws and Chickasaws were treated in about the same way that the Seminoles were in regard to this western land, and nothing appears to show any prejudice against the Choctaws and Chickasaws in this negotiation.

The lands of the Leased District could not have been transferred by the Third Article of the Treaty of 1866 as a matter of barter and sale, for the reason that the United States occupied the position of Guardian to its Ward, and could not buy an estate worth 7,713,000.00

dollars for the sum of 300,000 dollars which the ward was not to receive except under remote contingencies, because such a transaction would have been a colossal wrong and, although not intended, would have operated as a stupendous fraud on the ward in favor of the guardian.

"The Indian Nations may perhaps be more correctly "denominated domestic dependent Nations; their relation "to the United States resembles that of a ward to a "guardian."

Cherokee Nation *v.* Ga., 5 Peters, 1.
Worcester *v.* Ga., 6 Peters, 590.
Elk *v.* Wilkins, 112 U. S.
The U. S. *v.* Kagama, 118 U. S. 382.

COMPARISON WITH SEMINOLE CASE.

The third article of the treaty of 1866 proposes to give $300,000.00 to the Choctaws and Chickasaws for the cession of the Leased District, but provides that all of the $300,000.00 was to go to the freedmen in case they were removed. This article may be considered in the light of stipulations or propositions 5, 6, and 7. Proposition 3 stipulates for the incorporation into the Tribes of the freedmen on an equal footing with the original members, or "suitably provided for." "A suitable provision" was set up in the third article in the matter of forty acres apiece. This would have given each family of four persons 160 acres, the ordinary homestead provision for a frontier settler. In case the Choctaws failed to make this provision, then each freedman was to have $100.00 apiece when the Government removed such freedman. This would have given $400.00 in money to each family of four persons, and would have enabled them to buy land elsewhere. So that the $300,000.00 which would have

been required to be paid out in case the freedmen removed should not be considered the less a partial payment on the Leased District, except in so far as it was made compulsory on the Choctaws and Chickasaws, who, it will be remembered, were not permitted to amend or modify the treaty submitted to them September 21, 1865 (see page 311), and which shows that they should not be held entirely responsible for any draft of the treaty made by the Government officers.

Considering, for argument's sake, that the Government had a right to compel the Choctaws to give the sum of $300,000.00 to their freedmen, still this $300,000.00, together with the $[illegible]00,000.00 paid in 1855 for the Leased District as above explained, would only make a total of $[illegible]00,000,00 for the lands of the Leased District. These lands, outside of Greer county, amounted to a fraction over 6,000,000 acres, and the joint payments would have been 12 cents an acre. Attention is called to this especially for the reason that this is the same allowance which was provided for the Seminoles for their Western lands. It is not pretended by the Government that the 15 cents an acre which the Seminoles received for the cession of their lands to the United States by the treaty of '66, a cession in terms absolute on its face, although "done" in compliance with the desire of the United States to locate other Indians and freedmen thereon, was in full settlement and payment of the title or that the Government by such payment acquired the fee.

If, then, the Guardian did not acquire from the Seminoles the full title to the land when the Seminoles were paid 15 cents an acre and when the Seminoles used the words "*cede*" *and* "*convey*," how can the Guardian, or any one on behalf of the Guardian, insist that the same amount of 12 cents an acre paid to the Choctaws for their

Western lands should give the Government a good title when the Choctaw treaty only used the word "*cede*" and did not use the term "*convey*"? No one can be heard to say that the Guardian armed with sovereign power and addressing the ward as his child, speaking of the Government as the Great Father, will allow the Great Father to acquire this huge estate for the pitiful sum of 15 cents an acre. Such a transaction in the name of the Government of the United States would put upon the Government the dishonor of defrauding and wrongfully depriving its weak and defenceless child of its inheritance. Although it is possible that in some instances officials of the Government may have attempted sharp practices upon the ignorance of the Indians under the safety of great power and under the protection of the shrewd use of language not well understood by the Indians, it is not true that the Government of the United States has ever been willing either to defraud an Indian or to let an Indian be defrauded in behalf of the Government. And in no instance have the courts of the United States erected by that Government ever failed to do exact and painstaking justice by the Indian people. The theory that the Government is capable of depriving the Choctaws and Chickasaws of their estate without giving them an adequate compensation therefor is absolutely and entirely untenable and cannot be entertained.

### What is the Measure of the Trust.

If, then, it be established that the Leased District is held by the United States in trust for certain purposes, it remains to determine with precision what these purposes were. They were ceded in trust and "set apart to "be purchased for the use of such Indians from Kansas

" or elsewhere as the Government might desire to col-
" onize therein on such terms as may be agreed upon by
" the parties and approved by Government or such as
" may be fixed by the Government."

Stipulation 5 set forth in Commissioner Cooley's Report, p. 299, as President of the Southern Treaty Commission, states that "A portion of the lands owned and " occupied by you *must be set apart* for the friendly " *tribes in Kansas and elsewhere* **on such terms** as may be " *agreed upon by the parties* and *approved by the Govern-* " *ment*, or *such as may be fixed by the Government*." The Commissioner says that copies of this proposition were prepared and furnished to each agent, with instructions that they be fully interpreted and explained to the Indians. The explanation of the meaning of this proposition is vitally important. The official report of the proceedings of the Council at Fort Smith (p. 19) uses the same language as to the Fifth Stipulation, and says: "The " President then stated that the agents will be supplied " with printed copies of the address and are requested to " go with an interpreter to their respective tribes for the " purpose of fully explaining what is said therein." The manner in which Stipulation 5 *was understood by the Indians* is made clear by *the express understanding* of *Hon. D. N. Cooley himself*, in his report to the Hon. James Harland, Secretary of the Interior, October 31, 1865, *which was submitted to Congress* for its *information*. He uses the language (p. 34) as to the Fifth Proposition, as follows:

" 5. A part of the Indian Country *to be set apart* TO BE " PURCHASED for *the use* of such Indians from Kansas or " elsewhere as the Government may desire to colonize " therein."

The Cherokee treaty made in pursuance of this understanding of the 5th proposition sets forth an elaborate scheme by which the Government was authorized "**To purchase** *for the use of other Indians*" Cherokee lands west of 96, and by which other Indians could buy lands east of 96 "*on such terms as may be agreed upon* by any such tribe and the Cherokees, subject to the approval of the President of the United States (14 Stats. 803, Article 15), and in regard to the lands west of 96, the United States were to settle friendly Indians under certain conditions: "Said lands thus disposed of **to be paid for** to "the Cherokee Nation *at such price as may be agreed on* "*between the said parties in interest*, subject to the ap- "proval of the President, and if they should not agree, "*then the price to be fixed by the President*," and

The Creek treaty (14 Stats. 786, Article 3) states that—

"In compliance with the desire of the United States "to locate other Indians and freedmen thereon, the "Creeks hereby cede and convey to the United States "**to be sold to** and used as homes for such other civil- "ized Indians as the United States may choose to settle "thereon, to wit, half of their entire domain." Before this they were paid 30 cents an acre, and afterwards, in 1889, the balance, making $1.25 an acre.

The Seminole treaty (14 Stats. 757, Article 3) recites:

"In compliance with the desire of the United States "to locate other Indians and freedmen thereon, the Semi- "noles cede and convey to the United States their entire "domain, being the tract of land ceded to the Seminole "Indians by the Creek Nation," &c., at 15 cents an acre, the balance up to $1.25 having been paid them in 1889 as above set forth. In the same article the United States conveys to the Seminoles out of the land granted by the Creeks 200,000 acres, for which the Seminoles **paid** 50

*cents an acre*, in pursuance of the plan by which the lands set apart for the use of other Indians was **to be sold** for a price paid and which was thus paid by the Seminoles.

The Choctaw-Chickasaw treaty (14 Stats. 769, Art. 3) recites:

"The Choctaws and Chickasaws, in consideration of "the sum of $300,000.00, hereby cede to the United "States the territory west of the 98th degree west longi- "tude known as the Leased District," &c.

These people were all in Washington at the same time, in daily intercourse with each other, understood perfectly well the purpose of the treaties of 1866, had no doubts whatever as to meaning of the Government and of themselves, and it is not at all strange that having a thorough understanding of the meaning of the treaties, the Choctaws were not suspicious and let the third article read as it does, simply ceding the land, not entertaining the idea that the Government would be capable of putting a totally different construction upon the treaty to that which the Commissioners of the United States had explained to them so fully, and about which there was no misunderstanding whatever. Not only do these treaties with the Five Civilized Tribes exhibit the purpose of the Government at this time, but a number of the other Indian treaties exhibit the same; for example: The Delaware treaty (14 Stats. 794, Art. 4) recites:

"The United States agrees **to sell** to the said Del- "aware Indians a tract of land ceded to the Government "**by the Choctaws and Chickasaws** the Creeks or the "Seminoles, or which may be ceded by the Cherokees in "the Indian country to be selected by the Delawares, "&c.," and the Delawares did in fact **buy** 157,600 acres from the Cherokees east of 96 for $157,600.00. The

Leased District land **alone** was ceded the United States by the Choctaws and Chickasaws, and in 1867 we find the United States proposing to *sell*, thus showing it was set apart "*to be purchased.*"

October 14, 1865, the United States agreed with the Cheyennes and Arapahoes (Stats. 14, 704, Art. 2) that certain lands on the Cherokee and Creek lands should be "*set apart for the absolute and undisturbed use* and occupation of the tribes who are parties to this treaty and of such other friendly tribes as they may from time to time agree to admit among them, and that *no white person except officers, &c., . . . shall go upon* or settle within the country embraced within said lands. . . . Provided, however, that said Indians shall not be required to settle upon such reservation until such time as the United States **shall have extinguished** all claims of title thereto *on the part of other Indians* [Cherokees or Creeks], so that the Indians parties hereto may live thereon at peace with all other tribes."

The Kiowas and Comanches by the treaty of October 21, 1867 (15 Stats. 582, art. 2), were given the right to locate on their present reservation, which was

"*Set apart for the absolute and undisturbed use* and occupation of the tribes herein named and for such other friendly tribes or individual Indians as from time to time they may be willing (with the consent of the United States) to admit among them, and the United States now solemnly agrees that *no person except those herein authorized so to do and* except such officers, agents, and employes of the Government as might be authorized to enter upon Indian reservations in discharge of duty enjoined by law, shall ever be permitted to pass over, *settle upon*, or *reside in the territory described in this article* or in such territory as may be added to this reservation for the use of said Indians."

It will be observed how closely this language follows the stipulations of the Commissioners in the Council at Fort Smith. The Kiowas, Comanches, and Apaches did not pay for their privilege *in money*, so that the Government received nothing in the form of money for this right of use and occupancy of that portion of the lands of the Leased District. **The considerations received by the United States** in exchange for this cession of land to the Kiowas, Comanches, and Apaches were as follows:

First. Article I. "War between the parties to this "agreement shall forever cease."

Article II. The Kiowas and Comanches "relinquish all "right to occupy permanently the territory outside of their "reservation as herein defined" [a huge country].

Third. "They will withdraw all opposition to the con- "struction of the railroad now being constructed on the "Smoky Hill river."

"They will permit the peaceable construction of any "railroad not passing over their reservation as herein de- "fined."

"They will not attack any persons at home, nor travel- "ling, nor molest nor disturb any wagon-trains, coaches, "mules, or cattle belonging to the people of the United "States or to persons friendly therewith."

"They will never capture or carry off from the settle- "ments white women or children."

"They will never kill nor scalp white men nor attempt "to do them harm."

"They withdraw all pretense of opposition to the con- "struction of the railroad now being built along the Platte "river and westward to the Pacific Ocean."

"They will not in the future object to the construction "of railroads, wagon roads, mail stations, or other works "of utility or necessity, which may be ordered or per- "mitted by the laws of the United States."

"They agree to withdraw all opposition to the military "posts now established in the western territories," etc., etc.

**These assets** which were received by the United States were not available as a fund with which to liquidate the indebtedness of the Government to the Choctaws and Chickasaws for their equitable title to this territory. Nevertheless *it saved the Treasury of the United States a very large sum of money* which would have been otherwise necessary in dealing with these wild Indians who were on the war-path.

**On a similar basis** the Apache Indians (15 Stats. 590, Art. 1) confederated with the Kiowa and Comanche Indians and relinquished their personal rights to lands and became a part of the Kiowa and Comanche Indians.

With the Cheyenne and Arapahoe Indians on October 28, 1867, (15 Stats. 594, Art. 2) land

"Is hereby *set apart for the absolute and undisturbed* "*use* and occupation of the Indians herein named, and "for such other friendly tribes or individual Indians as "from time to time they may be willing, with the consent "of the United States, to admit among them; and the "United States now solemnly agrees that *no persons*, ex- "cept those herein authorized so to do, and except such "officers, agents, and employés of the Government as "may be authorized to enter upon Indian reservations in "discharge of duties enjoined by law, shall ever be per- "mitted *to pass over, settle upon, or reside in the territory* "*described* in this article, or in such territory as may be "added to this reservation for the use of said Indians."

These Indians practically engaged to do the same identical things which were above recited in the Kiowa-Comanche treaty. They will *relinquish their old territory, allow railroads to be built, quit scalping white men* and *carrying off white women*, and *allow military posts* and *mail routes to be established.*

The Government thus used this western estate in the

Indian Territory to *buy peace*. It would have cost a **great sum in money** if the United States had been compelled to buy with money or to have used money in the continued maintenance of an army to deal with these warlike tribes. The Government **received considerations** of great value to the Government, but of no value to the Choctaws and Chickasaws. The Government received considerations for the estate which were not available to the Choctaws and Chickasaws as purchase money, and consequently no offer was made by the Government of these very "incor-" poreal" assets.

The Pottawatomie Indians (15 Stats. 532, Art. 2) by treaty of February 27, 1867, are given the right of a reservation in Indian Territory, and the treaty recites: "In "case the new reservation shall be selected upon the "lands purchased by the Government from the Creeks, "Seminoles, or **Choctaws, the price to be paid** *for the* "*reservation shall not exceed the cost of the same* to the Gov-" ernment of the United States, and **the sum to be paid** "**by** *the tribe* for the said reservation shall be taken from "the amount provided to be paid by the Leavenworth, "Pawnee and Western Railroad Company for the lands "sold to them," &c.

Article 3 recites that "after such reservation shall have "been selected and set apart for the Pottawatomies it shall "never be included within the jurisdiction of any State "or Territory unless an *Indian Territory* shall be organ-" ized as provided for in certain treaties made in *1866* "**with the Choctaws** and other tribes occupying the "Indian country.

This Pottawatomie treaty of February 27 1867, is thus not only an executive construction of the highest character, made immediately subsequent to the Choctaw-Chickasaw treaty proclaimed July 10, 1866 (only seven months

apart), but is a construction by the Senate of the United States and by the Congresses that made the appropriations thereunder that

" the lands purchased by the Government from the * * * " Choctaws " might be selected at a " price to be paid," etc., and that the Leased District was set apart " to be " purchased."

The Leased District was the only land that by any possibility could be described as lands purchased of the Choctaws, and as the Pottawatomies were required to pay a certain price for such lands the report of the Commissioner of Indian Affairs that these lands were set apart " to be purchased " for the use of Indians is forcibly verified by the Pottawatomie treaty of February, 1867, as well as by the Delaware Treaty above quoted.

The Choctaws and Chickasaws (14 Stats. 777, Art. 30) agree that they

" Will receive into their respective districts east of the " 98th degree of west longitude, in the proportion of one- " fourth in the Chickasaw and three-fourths in the Choc- " taw Nation, civilized Indians from the tribes known by " the general name of the Kansas Indians, being Indians " to the north of the Indian Territory, not exceeding ten " thousand in number, who shall have in the Choctaw and " Chickasaw nations, respectively, the same rights as the " Choctaws and Chickasaws, of whom they shall be fellow- " citizens, governed by the same laws, and enjoying the " same privileges, with the exception of the right to par- " ticipate in the Choctaw and Chickasaw annuities and " other moneys, and in the public domain should the same " or the proceeds thereof be divided per capita among said " Choctaws and Chickasaws, and among others the right " to select land as herein provided for Choctaws and Chick- " asaws, after the expiration of the ninety days during " which the selections of land are to be made, as aforesaid, " by said Choctaws and Chickasaws," etc.

And Article 37 provides, "In consideration of the right "of selection hereinbefore accorded to certain Indians "other than the Choctaws and Chickasaws, the United "States **agrees to pay** *to the Choctaw and Chickasaw Na-* "*tions out of funds of Indians removing* into said nations "respectively, under the provisions of this treaty, such "sum as may be fixed by the legislatures of such nations "not exceeding **one dollar per acre** . . . with the under- "standing that at the expiration of twelve months the "actual number of said immigrating Indians shall be "ascertained, and **the amount paid** that may be actually "due at the rate aforesaid; and should still further im- "migrations take place from among said Kansas Indians, "*still further payments* shall be made accordingly from "time to time," and none of these Indian Tribes were expected to give up any land except at a reasonable price.

The Fifth Proposition as construed by Commissioner of Indian Affairs Cooley, in his report to the Secretary of the Interior, shows that the land was to be set apart for friendly tribes upon such terms **of purchase** as might be agreed upon by the parties vendor and vendee and approved by the Government, or, in case the parties vendor and vendee could not agree, then upon such terms as might be fixed by the Government. This western land was to be set apart **to be purchased** for the use of such tribes of Indians from Kansas or elsewhere as the Government might desire to colonize therein. The Government did desire to colonize therein a number of different tribes: the Osages; the Kaws; the Otoes and Missourias; the Poncas and Tonkewas; the Nez Perces and Pottawatomies; the Sac and Fox; the Iowas; the Kickapoos; the Pawnees; the Cheyennes and the Arapahoes; the Kiowas, Comanches, and Apaches; the Delawares and Shawnees; and the question is, in setting this land

apart *to be purchased*, was it intended *to be purchased* in fact in good faith at a fair and just value? The land was not set apart for the use of friendly Indians only; it was set apart **to be purchased** of the Five Tribes for the use of friendly Indians.

The Delawares, the Shawnees, the Osages, the Pawnees, the Otoes, the Missourias, the Poncas, &c., bought lands from the Cherokees, and the Cherokees were paid therefor at varying prices and their remaining equitable rights were finally bought outright as above set forth, so that it was a question *of purchase and sale for fair consideration with the Cherokees.*

The same thing is true with regard to the *Creeks*, whose land was set apart to the Sac and Foxes, Pawnees, Iowas, and Kickapoos. They were paid a considerable sum in 1866 and the remainder of *a fair purchase price* was paid them in 1889.

In case of the Seminoles they were paid a part of the price in 1866, the Pottawatomies and absentee Shawnees and Cheyennes and Arapahoes were located upon their lands and the Seminoles were paid the balance *of a fair price in* 1889, and the question now to be determined is as to the Choctaws and Chickasaws, who were paid substantially the same amount per acre that the Seminoles received in 1866, except that the Choctaws received ten cents an acre in 1855, five cents an acre in 1866, making a total of fifteen cents at that time, if they are not in like manner entitled equally to a fair price for their land.

Attention is called to the language of the treaties with the various Indians who were located upon this western country, for the reason that it exemplifies the policy which the Government of the United States had and which it did actually apply to all of the lands of the Indian Territory in-

differently, without making any exception whatever in the case of the Choctaw-Chickasaw lands west.

COMMISSIONER COOLEY.

Commissioner Cooley states (on page 35, Report 1865) that all the delegates had signed treaties on the breaking up of the Commission, including the Choctaws and Chickasaws; that—

"With the Choctaws and the Chickasaws a treaty was "agreed upon *upon the basis of the seven propositions* [**not "stipulations**] *heretofore stated* and in addition to which "those tribes agreed to a thorough and friendly union be- "tween their own people and forgetfulness of past difficul- "ties; to the opening of the leased lands to the settlement "*of any tribes* whom the Government of the United States "may desire to place thereon, and the cession of one-third "of their remaining area **for the same purpose;** the "United States *to restore this tribe to their rights,* forfeited "by the rebellion. This treaty, after its approval by the "Choctaws and Chickasaws, is to be signed in this city by "three delegates from each nation, sent here for that pur- "pose."

It will be seen from this language that the Commissioner understood that the opening of the leased lands to the the settlement of any tribes whom the Government of United States may desire to place thereon is strictly in accord with Article Five of the treaty drawn up at Fort Smith, as follows, to wit:

"ARTICLE FIVE. The Choctaw and Chickasaw tribes "agree to a modification of the 9th article of the treaty "concluded at the city of Washington the 22nd day of "June, A. D. 1855, by which they agree that all that por- "tion of their common territory west of the 98th degree "west longitude, leased by us to the United States, may

" be used for the permanent settlement of the Wichitas " and such other tribes or bands of Indians as the Gov- " ernment may desire to locate thereon, without exception " or restriction *as to the character of the tribes.*"

Attention is particularly called to the statement of Commissioner Cooley above quoted, in which he says that the Choctaws and Chickasaws agree to a treaty upon the basis of the *seven propositions heretofore stated* and "to " the opening of the leased lands to the settlement of any " tribes," &c., and "the cession of one-third of their re- " maining area *for the* SAME PURPOSE."

The purpose of the cession of one-third of their remaining area is absolutely clear. It is the cession of land for 10,000 possible immigrant Indians of 160 acres each at $1.00 an acre. It is a proposed sale of land at $1.00 an acre. If this cession is for *the same purpose* which the Commissioner understood obtained in "the " opening of the Leased Lands," then the Commissioner did understand that the cession of the Leased Lands was intended to enable immigrant Indians **to purchase homes** or to enable the Government to purchase homes for such immigrant Indians, they being indigent, as has been otherwise abundantly shown. The Commissioner says an agreement was made **with the Choctaws and Chickasaws** on the basis of the seven **propositions heretofore stated.** The fifth proposition, expressly referred to, reads, " **to be set apart to be purchased**," so no doubt can possibly exist that the Commissioner of Indian Affairs fully understood the **Leased District** was " **to be set apart to be purchased** " **for the use of other Indians.**

It having been represented to the Choctaws and Chickasaws by the agents of the Government that in common with the other members of the Five Civilized Tribes their western lands were to be set apart *to be purchased* for the

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use of other Indians upon such terms as should be agreed on, to be held for the use of such Indians, and the Government of the United States having located the Wichitas upon such lands and the Kiowas, Comanches, and Apaches upon such lands, it is the duty of the United States to provide for the Choctaws and Chickasaws **a fair purchase price** not only for the lands now rented to cattlemen by the Wichitas, the Kiowas, Comanches and Apaches, but also for the lands which will be occupied by the Wichitas, Kiowas, Comanches, and Apaches for allotments. The Choctaws and Chickasaws can raise no reasonable objection to the setting apart of one hundred and sixty acres to each Wichita and to each member of the Affiliated Tribes, but when such land is set apart for the individual use of these Indians, it should be remembered that it is set apart "*to be purchased*" for the use of these Indians upon such terms as may be agreed upon by the Choctaws and Chickasaws and Wichitas, or in the event that they fail to agree, upon such terms as may be fixed by the United States. If the Wichitas and Affiliated Tribes have no means with which to pay the Choctaws and the Chickasaws, and the United States proposed to place upon these lands impecunious purchasers, then the United States, assuming this right, becomes obliged as sovereign and guardian of the impecunious Wichitas to provide a full fair value to the Choctaws and Chickasaws of the land set apart to be purchased for the Wichitas. It cannot be maintained that having set this land apart to be purchased by the Wichitas, it shall in fact be set apart *to be given* to the Wichitas. The language that it is set apart to be purchased for the Wichitas means that it shall be purchased by the payment of **a fair purchase price** and nothing less than this; *no other conscientious construction can be given to this*

*language.* The Choctaws and Chickasaws have been required by the treaty of '66 to set apart this land for the use of friendly Indians. The conditions under which they have agreed to do so are fully set forth by the Commissioner of Indian Affairs in the citations above made from his language. He has explained very fully that these people were all dealt with on the same basis; no distinction anywhere appeared by which it was intended to treat one tribe better or worse than another tribe, but these treaties were all made upon *the same basis.* The seven propositions or stipulations were printed and given to each and every one of the tribes, including the Five Tribes and the others; it was explained to them, and the Commissioner himself explained what he understood by it, and that the land was to be set apart *to be purchased* for the use of other Indians. The terms of the purchase *to be agreed on* between the interested parties, or, in the event of their failure to agree, the President of the United States was to fix the price. The language is that the land is to be set apart

"to *be purchased* on such terms *as may be agreed upon*
"by the parties and approved by Government or such *as*
"*may be fixed by the Government.*"

It is shown by the Cherokee treaty, Articles 15, 16, that the method by which the Government would act was that the President should act and fix the price where the vendor and vendee failed to agree. In the case of the Choctaws and Chickasaws, the Wichitas being abjectly poor, and the Kiowas, Comanches and Apaches being on the war-path and being without funds and giving up to the United States a vast domain to which it was conceded they had occupant rights, a manifest reason is apparent why the officers of the Government did not bring the Kiowas,

Comanches, Apaches, and Wichitas into conference with the Choctaws and Chickasaws for the purpose of arranging the terms of purchase, when, if such terms were agreed upon, the purchase price could only be paid by applying to the Government to furnish the purchase price. The question of purchase price has been allowed to remain in abeyance all these years waiting the convenience of the Government.

The Kiowas, Comanches, and Apaches sold their right to a vast domain to which they were recognized as having the Indian occupant's title. They engaged to do things of great value to the United States and they were paid with Choctaw lands. The Choctaws are entitled to the full value of this property, whatever that value be, and when they are kept out of a settlement for the property, whatever increment of value has attached to the property in equity and in good conscience belongs to the Choctaws and Chickasaws.

Whatever obligations exist between the Kiowas, Comanches, Apaches, and the Wichitas and the United States should be determined by the relations existing between these Indians and the United States.

The United States cannot receive the title as trustee of the Choctaws *to be sold* to certain Indians and then convey such title to such Indians in any other capacity than trustee. The United States is responsible as trustee and must make a fair and equitable settlement. The Government had no rights in such property except as trustee of the Choctaws.

No theory can be allowed which would permit the United States as trustee to use the trust estate to liquidate the debts of the United States on any other account, but the United States in its relations to the Choctaws and Chickasaws must account to the Choctaws and Chick-

asaws as trustee of this estate and provide that the Choctaws and Chickasaws are secured a fair compensation for the trust estate, which is held by the United States *for the purpose of being sold to or purchased by friendly Indians*, which was the declared object of the United States in receiving this title in 1866.

CONCLUSION.

The land in question was patented to the Choctaws in fee simple 1842.

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1855.

For a certain cash payment of about 10 cents an acre they leased the land for *a use not then of determinable extent* on a basis that was to be "reasonable."

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1866.

For a contingent payment of 5 cents an acre they ceded the land to the United States as their trustee to be sold to and purchased by friendly Indians for Indian use.

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1899.

These friendly Indians are now renting the unused part of the property at a substantial income of exceeding $200,000 per annum without ever having paid any purchase price. These immigrant Indians are entitled to 160 acres each, the standard fixed in 1866, on the payment to the Choctaws of a fair purchase price. The remainder of the land should be returned to the Choctaws and Chickasaws or sold to the highest market bidder for the use and benefit of the Choctaws and Chickasaws.

Respectfully submitted.

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